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APPENDIX

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1631

STANLEY T. KUSPER, JR., ET AL.,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

Appeal from the United States District Court, Northern District of Illinois

FILED JUNE 16, 1972
PROBABLE JURISDICTION NOTED APRIL 2, 1973

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 28, 1971—Plaintiff's Complaint filed in the United States District Court for the Northern District of Illinois, Eastern Division.

Oct. 19, 1971—Defendants' original Answer filed.

Oct. 26, 1971—Plaintiff files Notice of Motion and Application for a Three Judge Panel.

Nov. 1, 1971—Plaintiff files Brief in Support of Application for a Three Judge Panel.

Nov. 11, 1971—Defendants file Brief in Opposition to Plaintiff's Application for Three Judge Panel.

Dec. 17, 1971—Court files its Memorandum Opinion and grants plaintiff's Motion for a Three Judge Court.

Jan. 20, 1972—Plaintiff files Motion for Summary Judgment and Brief in Support.

Feb. 10, 1972—Defendants file Amended Answer.

Feb. 10, 1972—Defendants file Answer to Motion for Summary Judgment and Suggestions.

Feb. 10, 1972—Oral Argument held.

Mar. 9, 1972—Opinion and judgment of the Three Judge District Court.

Mar. 13, 1972—Court issues Injunction Writ.

Mar. 17, 1972—Defendants file Notice of Appeal to United States Supreme Court.

COMPLAINT FOR DECLATORY (sic) AND INJUNCTIVE RELIEF

(Filed September 28, 1971)

To The Honorable Judges Of This Court:

Count One

1. The jurisdiction of this Court is invoked under Title 28, Section 1983, Title 42, Section 1971 (b) U.S.C.A. and the United States Constitution and more particularly, Article I, Article II, Amendment I, Amendment XIV, and Amendment XVI thereto.

2. The Plaintiff, Harriet G. Pontikes, is a citizen and qualified voter and elector residing in Ward 50, Precinct 36 of the City of Chicago, County of Cook, and State of Illinois.

3. The Defendants, Stanley Kusper, Francis P. Canary and Marie Suthers are the duly appointed commissioners of the Chicago Board of Election which has had and currently had jurisdiction over the elections held in the City of Chicago including the keeping of the voting lists past and present and including the certification of judges of elections to execute the election law.

4. The Election Code of the State of Illinois provides in relevant part:

> The following regulations shall be applicable to Primaries:
> No person shall be entitled to vote at a primary:
> (d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in

which such primary is held: Provided, participation by a primary elector in such primary is held (sic): Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make incorporated town or town only (sic) and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted after January 1, 1939, at the primary of another political party within a period of twenty-three calendar months next preceding the calendar month in which he seeks to participate is held. Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

5. The Plaintiff voted in the primary of the Republican Party in the primary election held on February 23, 1971.

6. There will be a primary election held throughout the State of Illinois including the City of Chicago on March 21, 1972, being less than 23 months from the last primary, wherein candidates for the offices of President of the United States, United States Senator and United States House of Representatives, among others will be chosen.

7. The Plaintiff wishes to vote in the primary of the Democratic Party in the aforesaid primary.

8. The Plaintiff will be denied her constitutional right to vote on March 21, 1972, by Chapter 46, Section 7-43d, Ill. Rev. Stats. (1971) infra.

Count Two

1-3. The Plaintiff realleges the allegations of paragraphs one through three of Count One of the Complaint and incorporates them by reference herein as if they were set forth in full hereunder.

4. The Election Code of the State of Illinois provides in relevant part as follows:

> The following regulations shall be applicable to primaries:
> No person shall be entitled to vote at a primary:
> (a) Unless he declares his party affiliations as required by this Article; Chapter 46, Section 7, 43a.

5. Concommitant with the rights to vote as guaranteed by the United States Constitution is the right to secrecy of the ballot.

6. There will be a primary election held in the City of Chicago on March 21, 1972, being less than twenty-three months from the last primary, where candidates for the offices of President of the United States, United States Senator and United States House of Representatives, among others, will be chosen.

7. Further, the voting rights Act of 1960 provides in relevant part as follows:

> (b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may chose, or of causing such other person to vote for,

or not to vote for, any candidate for the office of President, Vice-President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special or primary election held solely or in part for the purpose of selecting or electing any such candidate. Title 42, Section 1971 U.S.C.A. (1971).

8. The First Amendment of the United States Constitution guarantees the right to be free from an invasion of privacy; and the Fourteenth Amendment prohibits the state from violating said right.

9. The declaration of Plaintiff's party affiliation as required by Chapter 46, Section 7-43a (Ill. Rev. Stats. 1971) is intimidating to the Plaintiff and violates her constitutional right to vote, her right to cast a secret ballot as well as her Constitutional right to be free from invasion of privacy.

Wherefore, Plaintiff prays as follows:

1. That a three judge panel be invoked as provided in Title 28, Section 228 U.S.C.A.

2. That this Court or said three judge panel declare Chapter 46, Section 7-43d Ill. Rev. Stats. be declared void as violative of the Plaintiff's rights as guaranteed by the United States Constitution and Title 28, Section 1983 U.S.C.A. and Title 42, Section 1971b U.S.C.A.

3. That an injunction issue against the Defendants to prevent them from barring Plaintiff from voting in the primary of the Democratic party on March 21, 1972.

4. For an injunction against the Defendants and their agents, the Judges of Election, in Ward 50, Precinct 36 of the City of Chicago, Illinois, from asking and registering which primary the Plaintiff votes on March 21, 1972.

5. For such other relief as the Court deems just and equitable.

/s/ Ray Jeffrey Cohen
Attorney For Plaintiff

APPLICATION FOR THREE JUDGE PANEL

Now comes the Plaintiff, Harriet Pontikes, by and through her attorney, Ray Jeffrey Cohen, and states to this Honorable Court as follows:

1. The complaint filed herein seeks a permanent injunction against the enforcement of certain statutes of the State of Illinois, to wit:

Chap. 46, Sec. 7-43d, and Chap. 46, Sec. 7-43a (Ill. Rev. Stats. 1970);

2. The reasons cited for said injunction are that said statute is unconstitutional, as being in violation of Plaintiff's rights secured by Article I, Article II, Amendment I, Amendment XIV, Amendment XVI of the United States Constitution.

3. Time is of the essence.

Wherefore, Plaintiff prays for the appointment for a Three Judge Panel pursuant to the provisions of Title 28, Sec. 2281 and Title 28, Sec. 2284 (U.S.C.) and that the Clerk of the United States District Court for the Northern District of Illinois be directed to mail the

proper Statutory notices to the Governor of Illinois and the Attorney General of Illinois of any hearings.

/s/ Ray Jeffrey Cohen
Attorney for Plaintiff

BRIEF IN SUPPORT OF APPLICATION FOR THREE JUDGE PANEL

(Filed November 3, 1971)

The Plaintiff seeks a three judge panel to rule on this case since the complaint alleges that certain statutes of the State of Illinois violate the United States Constitution and the rights guaranteed to the Plaintiff thereunder. Count One of the complaint alleges that Chapter 46, Secion 7-43d of the Illinois Revised Statutes which prohibits a voter from changing party allegiance within 23 months is unconstitutional.

Count two alleges that Chapter 46, Section 7-43a which forces an individual to vocally declare his party affiliation as a prerequisite for voting is unconstitutional.

An injunction restraining the enforcement of said statute is sought by the Plaintiff. Title 28, Section 2281 of the United States Code provides as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an Order made by an administrative board or commission acting under State statutes, shall not be granted by a district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Sec-

tion 2284 of this title. June 25, 1948, C. 646, 62 Stat. 968.

The use of a three judge panel in election cases is altogether appropriate and has often been done. Most recently this procedure was invoked in this district where a determination of the constitutionality of the Illinois statutory provisions relating to the election of judges was sought. *Romiti* v. *Kerner*, D.C. Ill. 1966, 256 F. Supp. 35.

A suit brought in Mississippi challenging a state law requiring the registration of the names of political parties with the Secretary of State of Mississippi was required to be heard by the three judge court. *Howard* v. *Ladner*, D.C. Miss. 1953, 116 F. Supp. 783. Three judge panels were also required in cases taking state election laws brought by political candidates in *Stokes* v. *Fortson*, D.C. of Ga. 1964, 234 F. Supp. 575; *Votaggio* v. *Caputo*, D.C. of N.J. 1962, 210 F. Supp. 337.

The three judge panel has long been used to consider the constitutionality of reapportionment statutes. *Drew* v. *Scranton*, D.C. Pa. 1964, 229 F. Supp. 310, vacated on other grounds and remanded 85 S. Ct. 207, 379 U.S. 40, 13 L. Ed. 2d 107; *Lisco* v. *Love*, D.C. Colo. 1963, 219 F. Supp. 922, reversed on other grounds 84 S. Ct. 1459, 377 U.S. 713, 12 L. Ed. 2d 632; *Baker* v. *Carr*, D.C. Tenn. 1959, 175 F. Supp. 649.

The question involved herein is a substantial one since it affects all those who vote in party primary in the Democratic or Republican primary in February 1971. On information and belief, Plaintiff states that this amounts to more than 300,000 persons.

Most recently Judge Bernard Decker of this district was called upon to convene a three judge panel to determine the constitutionality of certain other sections of the Illinois election code in the case of *Caryl Bendinger et al* v. *Richard Ogilvie, et al,* Case No. 71 C 2037. In that case an individual was challenging the election statutes as so far as that prohibited his candidacy for the Illinois Legislation because of prior party affiliations. A three judge court was convened in that matter and it is now hearing said case.

The overwhelming weight of authority in this district and the county favor the impaneling of a three judge court herein.

Respectfully submitted,
/s/ Ray Jeffrey Cohen

BRIEF IN OPPOSITION TO THE PLAINTIFF'S APPLICATION FOR A THREE JUDGE PANEL

(Received November 10, 1971)

The Defendants, Stanley Kusper, Francis P. Canary, and Marie H. Suthers as the Chicago Board Of Election Commissioners, respectfully submit that this Honorable Court lacks the jurisdiction to invoke a Three Judge Panel to determine the Constitutionality of the State Statute alleged in the Plaintiff's Petition. In the Plaintiff's Petition for Declaratory and Injunctive Relief, she cites as the basis of this Court's jurisdiction, Title 28, Section 1983, Title 42, Section 1971(b) and the United States Constitution. An examination of these sections of the United States Code reveals that there is no Title 28, Section 1983, therefore, in that regard there is no basis

for this Court's jurisdiction. As regards Title 42, Section 1971(b), the Plaintiff has cited no actions specifically or otherwise in which any "person" has attempted to intimidate, coerce or threaten the Plaintiff if she elected to or attempt to exercise her elective franchise as required by that section. The jurisdiction of the United States District Court must be affirmatively alleged and shown in all cases relating to the issuance of injunctive relief and restraining the enforcement of a State Statute, *Nichols* v. *McGee*, 1959, 80 S. Ct. 90. The Plaintiff has failed to meet this requirement.

Assuming arguendo, although it is specifically denied, that this Court does have jurisdiction to impanel a Three Judge Court to hear this matter, its decision should be deferred pending the determination by the Three Judge Court, to which the Plaintiff made reference in her Brief in the case of *Caryl Bendinger et al* v. *Richard Ogilvie, et al*, Case No. 71 C 2037. That case involves the issue of the Constitutionality of the 23 month prohibitory period relating to changing of ones party affiliation, although in that case the Plaintiff was a Candidate for the Illinois Legislature and in the instant matter the Plaintiff desires to cast her ballot in the Primary Election. The main issue is whether or not the 23 month prohibitory period is constitutional.

For these reasons the Defendants request that the Plaintiff's Petition for Declaratory and Injunctive Relief be denied and that her complaint be dismissed.

Respectfully submitted,
/s/ Howard M. Miller
Attorney for Defendants

MEMORANDUM OPINION

Motion for Three-Judge Court

(Filed December 17, 1971)

Plaintiff is a citizen of the United States and a qualified voter and elector. Defendants are the duly appointed commissioners of the Chicago Board of Elections which has jurisdiction over elections and election procedure in the City of Chicago.

Plaintiff is challenging the so called "23-month rule" in regard to primary elections whereby a voter cannot cast a ballot in the primary of a particular party if he or she has cast a vote at the primary of another political party within a twenty-three month period preceding the current election.

The Election Code of the State of Illinois provides:

> The following regulations shall be applicable to Primaries:
> No person shall be entitled to vote at a primary:
> (d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in such primary is held (sic): Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make incorporated town or town only (sic) and entitled hereunder to make nominations of candidates for city, village or

> incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted after January 1, 1939, at the primary of another political party within a period of twenty-three calendar months next preceding the calendar month in which he seeks to participate is held. Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

Plaintiff claims that this provision prevents her from voting in the Democratic primary to take place on March 21, 1972, in violation of her constitutional rights, because she voted in the Republican Party primary held on February 23, 1971, which is within the 23-month prohibitory period of the statute.

Plaintiff further claims that her constitutional right to a secret ballot is violated by the statutory requirement of a declaration of party affiliation before one can vote in a party primary. The Election Code of the State of Illinois provides that:

> The following regulations shall be applicable to primaries:
> No person shall be entitled to vote at a primary:
> (a) Unless he declares his party affiliations as required by this Article; Chapter 46, §7, 43a.

Plaintiff contends that this provision infringes on her secret ballot rights, her right to privacy under the First Amendment, her right to vote and is furthermore in violation of 42 U.S.C. §1971, the Voting Rights Act of 1960. The Act provides that:

(b) No person, whether acting under color of law, or otherwise, shall intimidate, threaten, coerce or attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may chose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice-President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special or primary election held solely or in part for the purpose of selecting or electing any such candidate. Title 42, Section 1971 U.S.C.A. (1971).

Plaintiff argues that the declaration of party affiliation is an intimidation in violation of the Voting Rights Act. Plaintiff seeks a declaration voiding the pertinent voting statutes and an injunction against Defendants preventing them from barring her from voting in the Democratic Party primary on March 21, 1972. The case is presently before this Court on an application for a Three Judge Panel brought on Plaintiff's behalf.

Title 28 U.S.C. § 2281 provides that a three judge court must be convened where the constitutionality of a state regulation or statute is being challenged; the statute is of general application throughout the state; injunctive relief is sought; and a substantial federal question is raised. See *Ex Parte Poresky,* 290 U.S. 30 (1933); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962).

There is no doubt as to the presence of the first three ingredients and it is the last ingredient, the existence of a substantial federal question that must be decided.

The test for determining whether a constitutional claim is so insubstantial as not to require a three-judge court is whether "the question is obviously without merit or . . . its unsoundness results from previous decisions of this Court as to foreclose the subject and leave no reason for the inference that the question raised can be the subject of controversy." *Ex Parte Poresky,* 297 U.S. 30, 32 (1933).

Based on this test and the relevant case law we do not find Plaintiff's contentions so insubstantial as to deny her motion for a three judge court.

The case most analogous to ours was decided just one month ago in this District. In *Caryl Bendinger, et al.* v. *Richard Ogilvie, et al.*, 71 C 2037, the plaintiffs challenged the Illinois statutory requirement that in order to be eligible candidate in a political party primary, a person cannot have "requested a primary ballot of another party at a primary election held within 2 years of the date on which the petition [for nomination] must be filed." Ill. Rev. Stat., Ch. 46, §8-8. The three-judge court discussed the compelling state interest that must be present to justify voting regulation (See *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *NAACP* v. *Button,* 371 U.S. 415 (1963); *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill.)) and decided that the Illinois Legislature had several compelling reasons for passing the so called "24-month rule". Some of these reasons were: To prevent party subversion by putting up sham candidates; to preserve party loyalty; to limit the elective process to manageable and realistic proportions by preventing the resulting confusion from an overabundance of candidates; and to preserve party politics.

The Defendants in our case argue that these very same compelling reasons are present in the voter situation and the *Bendinger* case therefore forecloses any substantial constitutional issue and consequently a three-judge court should not be convened.

We disagree. The *Bendinger* case made it abundantly clear that it was referring only to the statute regarding *candidates* and not to voter restrictions. The Court said:

"Plaintiffs rely on *Gordon* v. *Executive Committee of the Democratic Party of the City of Charleston,* 71-852 (D.S.C. September 28, 1971), in support of their argument that the '24 month rule' is unconstitutional. However, *Gordon* dealt with the restriction upon party switching placed on voters in primary elections. The instant case involves the restriction placed upon candidates in primary elections. The state's interest in limiting candidates from switching parties, as detailed above, is greater than its interest in limiting voters from switching parties. The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so."

There being a substantial constitutional issue involved in this case not in any manner foreclosed by prior law we grant the Plaintiff's motion for a three judge court.

Enter: /s/ Abraham L. Marovitz
Judge

Date: Friday, December 17, 1971

MOTION

Now comes the Plaintiff, Harriet Pontikes, by and through her attorney, Ray Jeffrey Cohen, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves for Summary Judgment on Count One and Count Two of the Complaint and further for the entry of a permanent injunction as prayed for in the complaint.

/s/ Ray Jeffrey Cohen
Attorney for Plaintiff

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This is a suit to enjoin the enforcement of a certain statute of the State of Illinois which prohibits a voter who voted in a party primary from voting in a party primary of another party within twenty-three months. The statute provides:

> The following regulations shall be applicable to Primaries:
> No person shall be entitled to vote at a primary:
> (d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in such primary is held (sic):

> Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make incorporated town or town only (sic) and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted after January 1, 1939, at the primary of another political party within a period of twenty-three calendar months next preceding the calendar month in which he seeks to participate is held. Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

Count One alleges that the Plaintiff is a qualified voter who cast a ballot in the primary of the Republican Party on February 23, 1971, and who now seeks to vote in the Democratic Primary to be held on March 21, 1972, being within twenty-three months of one another. It is alleged that this Statute effectively bars plaintiff from voting on March 21, 1972, and thus violates her constitutional right to the ballot.

There is no dispute as to the facts in this case.

The United States Supreme Court has held that the right to vote is a fundamental one in our country. *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964). Courts have also held that Federally protected constitutional rights will be protected in primaries as well as in general elections. *Brown* v. *Baskin*, 73 F. Supp. 933 (1948 D.C.).

Many states including Illinois have residency requirements which limit the franchise to those voters who have resided in the State, County and/or Precinct for a certain length of time. The Courts have upheld these but only where there was a "sound or compelling reason" to abridge the individuals right to vote. *Lassiter* v. *North Hampton County Board of Elections,* 360 U.S. 451, 3 L. Ed. 2d 1072, 79 S. Ct. 985 (1959).

States have set up residency requirements as a precondition to certain rights within that state in other areas such as public aid and divorce. These statutes have been attacked as violative of equal protection and the Courts have more recently become pre-disposed to protect the individual's right to equal protection as opposed to the State's right to grant rights to only bona fide residents. Recently, a three judge panel in this Circuit struck down the Wisconsin divorce law residency requirement and held that the individual's rights were superior to the state interests which were argued in support of the two year waiting period before filing a divorce. *Wymelenberg* v. *Syman,* 328 F. Supp. 1353, Eastern District of Wisconsin, June 30, 1971.

There is no question that the Plaintiff will be prohibited from voting by the statute for those candidates, being individuals seeking nomination in the Democratic party, whom she desires to on March 21, 1972, because of her past actions. The Plaintiff's right to vote is far more substantial than whatever state or party interests might be served prohibiting party switching within a twenty-three month period.

Recently, a three judge panel in this Circuit in the case of *Bendinger* v. *Ogilvie,* 71 C 2037, challenged the

statutory requirement that a candidate for office cannot have voted in the party primary of another political party within twenty-three months from the date on which his nominating petitions must be filed. In upholding the statute the Court said that the interest in sustaining the two party system overrode the right of the Plaintiff to become a candidate of an opposite political party. However, the Court stated that "The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so".

Recently a case nearly identical to the instant one was decided by a three judge panel in South Carolina. In the case of *Gordon* v. *Executive Committee of the Democratic Party of the City of Charleston.* The South Carolina statute stated

> "I do solemnly swear or affirm that I am duly qualified to vote at this primary election and in this club, and that I have not voted before at this primary election or in any other party's primary election, convention, or precinct meeting held this year." Section 23-400.71, Code of Laws of South Carolina, 1962.

A Republican Primary was held on February 20, 1971. Following that, a primary election was held in the Demo-

cratic party on June 8, 1971, for the Federal Housing of representatives. Certain voters sought to vote in that election even though they had voted in the primary in February. The Democratic Party of Charleston permitted the Plaintiffs and others to vote in the June 8 primary in derogation of the statute prohibiting and voting. The Court ruled that the action of the Defendants had been proper since the statute was clearly unconstitutional. The Court stated "We can perceive no basic difference between a durational residence restriction and one which, using a like durational standard, bases the restriction upon the manner in which one had previously voted. No sound or compelling purpose can possibly justify 'locking' a citizen into a party and denying to him for a full year freedom to change parties. Such an arbitrary restraint upon the voter is both unreasonable and unconstitutional. Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or the actions of elected representatives may have convinced the voter that a change in party allegiance is warranted".

There can be absolutely no distinction between a one calendar year rule as found in South Carolina and a twenty-three month rule in Illinois. If anything, the interpretation given the South Carolina statute that prohibits party switching of a period less than 120 days stands as clear precedent to strike down the Illinois statute and any others which diminish or eliminate one's right to vote. If a state has no right to limit a switch in four months time, how can it have the right to limit a switch in twenty-three months?

Wherefore, Plaintiff alleges that an injunction issue permanently enjoining the enforcement of said Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

Count Two

In Count Two the Plaintiff seeks to enjoin the enforcement of a certain Illinois Statute which requires that voters openly declare their party affiliation as a prerequisite to voting in the primary. The Statute provides:

> The following regulations shall be applicable to primaries:
> No person shall be entitled to vote at a primary:
> (a) Unless he declares his party affiliation as required by this Article; Chapter 46, Section 7, 43a.

There is no dispute as to the facts.

It is alleged that this statute is a violation of the Plaintiff's right to privacy and the right to freedom of association. The constitutional right of privacy and its protection against state invasion is protected by the first and ninth Amendments to the Constitution. *Griswold* v. *Connecticut*, 1965, 381 U.S. 479, 14 L. Ed. 2d 510, 355 S. Ct. 1678. It is an important corrolary to the right to vote that the ballot be kept a secret. The secret ballot is an integral part of the Anglo-American voting tradition which has been preserved to this day. In voting booths the voter is shielded from others by a curtain; No one is allowed to infringe on this privacy; No names are placed on the ballots for signature by the voter—why then the anomalous situation that a voter must devulge allowed his party preference. Since in no primary in recent memory has there been a contest for every single office. This devulging of information clearly indicates for whom a voter is to cast his ballot. It is the prac-

tice of the Defendants to record this party preference in the "binder" and preserve a permanent record of a person's affiliation. Although this information is allegedly kept confidential between Defendants, no state or governmental body has the right to this information.

In recent years question of freedom of association has arisen with respect to allegedly subversive or un-American groups and their membership lists in attempting to balance the right of the individual to secret the names of those he associates with as against the state interests in knowing the activities of groups. The Courts have looked at the groups to determine whether there was a "substantial relationship between the information found and compelling state interest". *Gibson* v. *Florida Legislative Investigative Committee,* 1963, 372 U.S. 539, 9 L. Ed. 2d 929, 935, 83 S. Ct. 889. It is thus been held that the State of Florida could not compel the NAACP to produce its membership lists.

There is no substantial state interest in knowing the party preference of an individual voter. Therefore, the constitutionally protected right to remain free from invasion or privacy and to be allowed freedom of association clearly is controlling in the Illinois statute aforementioned violates Plaintiff's constitutional rights. The forfeiture of these rights cannot constitutionally serve as a prerequisite to voting to one otherwise qualified to cast a vote.

Wherefore, Plaintiff prays for the entry of a permanent injunction in joining the enforcement of Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

AMENDED ANSWER

Now come defendants by their attorneys, Howard M. Miller, Aldus S. Mitchell and Sophia H. Hall answering the Complaint for Declaratory and Injunctive Relief and say:

Count I

(1) Defendants deny that this court has jurisdiction under Title 28 USC § 1983 as alleged or Title 42 USC § 1983 as more particularly set out hereafter. Defendants deny that this court has jurisdiction under Title 42 USC § 1971 (b) or any other sub-section of 42 USC § 1971.

Defendants further say that no private citizen is given the right under Title 42 USC § 1971 to bring any action under that section in United States District Court; this court has no original jurisdiction under Title 42 U.S.C. 1983 of Title 42 U.S.C. 1971 to protect rights alleged under the Articles and Amendments to the United States Constitution as set out in paragraph 1 of Count 1 of plaintiff's complaint.

(2) Defendants admit the allegations of paragraph 2 of plaintiff's complaint.

(3) Defendants admit the allegations of paragraph 3 of plaintiff's complaint.

(4) Defendants deny that the portion of the Illinois Election Code set out in paragraph 4 of plaintiff's complaint is all of the relevant portion of the Illinois Election Code concerning primary voting.

Defendants respectfully call the court's attention to Ill. Rev. Stats. Chapter 46 § 7-43 and § 7-44 as being

relevant to the right to vote in a primary held under the Illinois Election Code to-wit:

§ 7-43 *Qualifications of Voters at primary elections* Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years shall be entitled to vote at such primary.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for other officer or offices, shall not disqualify such primary elector from participating in other primaries of his party: And provided that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political

party under the provisions of Section 7-2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held.

(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by Article 6 of this Act shall be entitled to vote at such primary.

(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Articles 4, 5 or 6 of this Act when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held.

§ 7-44 *Announcement of voter's name, etc.—initialing primary ballot—Challenges* Any person desiring to vote at a primary shall state his name residence and party affiliation to the primary judges one of whom shall thereupon announce the same is a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. When Article 4, 5 of 6 is applicable the Certificate of Registered Voter therein prescribed shall be made and signed and the official poll record shall be made. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as hereinafter provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary.

(5) Defendants admit the allegations of paragraph 5 of plaintiff's complaint.

(6) Defendants deny that a candidate for office of President of the United States will be chosen at the primary election in the State of Illinois to be held on March 21, 1972. Defendants admit all other allegations of paragraph 6 of plaintiff's complaint.

Defendants further say that the defendant's jurisdiction in administering Election laws of the State of Illinois extend only to the City of Chicago and Villages of Berwyn, Cicero, Stickney and Lyons. That the primary election is governed by the Election Code of the State of Illinois pursuant to Article 1, Section 4 of the Constitution of the United States and the Tenth Amendment to the Constitution of the United States.

(7) Plaintiff has no right to vote in the primary of the Democratic Party having voted in the primary of the Republican Party in 1971, less than 23 months prior to the primary of the Democratic Party to be held on March 21, 1972.

(8) Defendants deny each and every allegation of paragraph 8 of plaintiff's complaint.

Defendants further say the right to vote in Elections is regulated by the laws of the State of Illinois except where Congress shall have by laws altered the State regulations as to choosing Senators and Representatives pursuant to Article 1, Section 4 of the Constitution of the United States. Congress has passed no law preventing the State of Illinois from determining the qualifications of persons to vote in a political party primary.

Count II

Defendants repeat and reallege the allegations of paragraphs 1 through 8 of Count I of their Answer as paragraphs 1 through 8 of the Answer to Count II of plaintiff's complaint as if fully set herein in haec verba.

(9) The Constitution of the United States and the Constitution of the State of Illinois do not protect the right to vote in party primaries in the State of Illinois. The right to participate in primaries of political parties is limited to members and affiliates of the particular political party involved. The right to secrecy of ballot does not relate to the determination of the primary in which one wishes to participate but to protecting voters in casting a vote for a person of their choice as the nominee of the political party in whose primary that voter participates.

(10) Defendants deny that a candidate for the office of President of the United States will be chosen 1 March 21, 1972. Defendants admit the other allegations of paragraph 6 of Count II of plaintiff's complaint.

(11) Defendants admit that paragraph 7 of Count II of plaintiff's complaint sets out a portion of Title 42 U.S.C. § 1971. Defendants respectfully call the court's attention to Title 42 U.S.C. § 1971 (c), to-wit:

> (c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceedings for preventive relief, including an application for a per-

manent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth or Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever in a proceeding instituted under this subsection any official of a State or sub-division thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section the act or practice shall also be deemed that the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

The Attorney General of the United States has brought no action against any officer of or the State of Illinois pursuant to 42 U.S.C. 1971.

(12) Neither the defendants nor the Illinois Election Code interfere with any right of the plaintiff to be free from invasion of privacy. Plaintiff has no right to participate in a political party primary in the State of Illinois except that the plaintiff complies with laws of the State of Illinois.

(13) Defendants deny each and every allegation of paragraph 9 of Count II of plaintiff's complaint.

Wherefore defendants pray that:

Judgment be entered for the defendants.

That plaintiff's prayer for three (3) judge court pursuant to 28 U.S.C. § 2281 be denied for want of a substantial Federal question.

For such other relief as is necessary in the premises.

/s/ Howard M. Miller
/s/ Sophia H. Hall
/s/ Aldus S. Mitchell
Attorneys for defendant

State Of Illinois
County Of Cook—ss.

Stanley T. Kusper, Jr., being first duly sworn deposes and says that he is the Chairman of the Chicago Board of Election Commissioners and has knowledge of the facts stated herein; that he has read the Amended Answer to plaintiff's complaint and matters stated therein are true.

.....

Subscribed and Sworn to before me.
this ..... day of ....., 1972

.....
Notary Public

ANSWER TO MOTION FOR SUMMARY JUDGMENT AND SUGGESTIONS.

Plaintiff's Motion for Summary Judgment is insufficient under Rule 56 Federal Rules of Civil Procedure. The essential allegations contained in plaintiff's complaint are not admitted by the defendants and there are no supporting affidavits, depositions, answers to in-

terrogatories or admissions on file in this cause. It is well settled that on motions for summary judgment, the court must view the record in the light most favorable to the party opposing the motion for summary judgment. *Crest Auto Supplies, Inc.* v. *Ero Manufacturing Co.*, 360 F. 2nd 896 (C.A. 7, 1966).

Plaintiff's complaint does not set out a basis for this Court's jurisdiction. Despite the plain language of Rule 8 (a) FRCP, the complaint in this cause does not state a sufficient basis for this Court taking jurisdiction in this cause. The Federal District Courts are Courts of limited jurisdiction, having only the jurisdiction conferred by Statute. See 28 U.S.C. § 1331 through § 1362. For the most part that jurisdiction is not exclusive of the state court's jurisdiction. The defendants and this court the entitled to be advised by the plaintiff of the statutory authority on which plaintiff relies in seeking a remedy in the Federal District Court. See *Gully* v. *First National Bank in Meridian*, 299 U.S. 109, 57 S. Ct. 96 (1936); *Pan American Petro Co.* v. *Superior Court of Delaware*, 366 U.S. 656, 81 S. Ct. 1303 (1961). The complaint which sets forth no statute relied upon as conferring jurisdiction is fatally defective. *Ivey* v. *Frost*, 346 F. 2d 115 (1965), *Voracheck* v. *United States*, 337 F. 2d 797 (1964), and the cause should be dismissed for want of jurisdiction. *McNutt* v. *McHenry Chevrolet Co.*, 298 U.S. 190, 56 S. Ct. 785 (1936).

Assuming arguendo that there is no genuine issue as to any material fact and that this Court does have jurisdiction, plaintiff's complaint does not state a claim on which relief should be granted.

In *United States* v. *Arizona*, 400 U.S. 112, 91 S. Ct. 260 (1970) the United States Supreme Court spelled out the relationship between the States and the Federal Government regarding elections. From that case, it is clear that the States have the right to determine the qualifications of their voters except where Constitutional Amendments, Amendments Fourteen, Fifteen, Seventeen, Nineteen and Twenty-Four or congressional enactments pursuant to Article I, Section 4 have limited that right. Plaintiff has not called to the attention of the Court any statute or case limiting the right of the State to determine the qualifications of its voters. Defendants have found no such enactment or case.

Defendants have no desire to challenge the broad general principles set out in plaintiff's brief in support of the Motion for summary judgment. Defendants however feel that it is their duty to point out to the court that *Reynolds* v. *Sims*, 377 U.S. 533 (1968) and *Brown* v. *Baskin*, 78 F. Supp. 933 (1964) are inappropriately cited as authority. The *Reynolds* case involved legislative reapportionment and the *Brown* case involved racial discrimination. It is well settled that racial discrimination can play no part in determining who can vote in elections in the United States. It is equally well settled that discrimination because of geographical location in a State will not be tolerated so as to unduly dilute a vote cast. In the case at bar, however, plaintiff makes no claim of discrimination or denial of equal protection of the laws. Plaintiff makes no claim that she is treated differently from any other citizen resident in the State of Illinois. Plaintiff claims and defendants admit that plaintiff

voted in the Republican Party primary on February 23, 1971. Plaintiff has the right to vote in the Republican Primary on March 21, 1972, or she may forego that right on March 21, 1972 if she no longer wishes to participate in the Republican Party. Her wishes are not germane to the questions before this Court. We respectfully suggest that the question open to determination is whether Chapter 46 § 7-43 (d) Ill. Rev. Stat. (1971) violates some portion of the Federal Constitution or violates a statute enacted by the Congress of the United States protecting the right to vote in a political party primary. Plaintiff does not so allege or offer authority to warrant this Court so finding. In *Lippitt* v. *Cipollone*, ... U.S. ....., ... S. Ct. ..... (1972) (Slip opinion attached as Exhibit A) the United States Supreme Court considering a decision of the United States District Court for the Northern District of Ohio affirmed the decision. It is clear from the dissent of Mr. Justice Douglas that the court was considering a statutory election plan not unlike the Illinois election plan. The Illinois election plan permits participation in a Political party primary if the voter has not participated in another party's primary within 23 months of the primary election to be held, instead of four (4) years as in Ohio. The Supreme Court refused to overturn the trial court decision. We respectfully submit that the action of this court should be controlled by the decision of the Supreme Court affirming the District Court in the *Lippitt* case, supra.

The Illinois legislature, in its wisdom, has adopted a plan of elections which protects political parties without regard to political philosophy. The Illinois Election

Code even provides an easy means for persons of like political persuasion to "Associate", to seek political office and to form a new political party. Chapter 46 § 10-2 Ill. Rev. Stat. (1971). Considering the contest in Cook County for the nomination of the Democratic Party for the office of State's Attorney and the fact that there is no contest for that office in the Republican Party, it does not stretch the imagination to understand the "wish" of a Republican Party participant to take part in the Democratic Party Primary. Without restrictions on changing parties the associates of the Republican Party can influence the choice of the Democratic Party for the benefit of the Republican Party nominee. The decision of this Court in *Bendinger* v. *Ogilvie,* ..... F. Supp. ..... (1971) and the rationale of that decision concerning candidates and the "24 month rule" is equally applicable in the case at bar. The protection of Political Parties in regard to candidates is of no value if that protection is eroded by party switching of voters. That switching can prevent a political party from having a candidate in the general election who truly supports the principles of the party he allegedly represents.

The State has a legitimate interest in protecting the multi-party system. It has enacted an Election Code which freely permits association of persons of the same political bent. The State has determined the conditions under which persons may participate in elections in this State. It has done so without violating any right granted or protected by the Federal Constitution, and the plaintiff has neither pleaded nor shown the contrary.

Count II

42 USC 1971 empowers the Attorney General of the United States to bring an action to secure a remedy under enumerated circumstances and the District Courts are granted jurisdiction to hear and determine the action brought. This section of Title 42 is grounded in the XV Amendment to the Constitution of the United States, *U. S.* v. *Mississippi*, 380 U.S. 128, 85 S. Ct. 808 (1965) and its purpose is to prevent racial discrimination. The United States is an aggrieved party when voters or potential voters are discriminated against in violation of the right to vote granted by the XV Amendment. *U. S.* v. *Mayton*, 335 F. 2d 153 (C.A. Ala. 1964). There is no claim in the case at bar of a violation of Amendment XV to the Constitution of the United States.

Chapter 46 § 7-43(a) Ill. Rev. Stats. should be read in conjunction with Chapter 46 § 7-5 Ill. Rev. Stats. Both sections of the Illinois Election Code should be considered in light of the comments of the defendants regarding Count I of plaintiff's Complaint which is incorporated herein in haec verba by reference. The State of Illinois, as approved by the Supreme Court of the United States in *U. S.* v. *Arizona*, Supra in ordering elections in the State has required that all political parties hold their primary elections for nomination of the party on the same day. Chapter 46 § 10-2 Ill. Rev. Stats. should not be emasculated to satisfy the whim of the plaintiff in the case at bar. Without the requirements of Chapter 46 § 7-43 a and Chapter 46 § 7-44, how can one determine the political party primary in which a voter wishes to participate? The secrecy of the ballot, of which plaintiff makes a central theme in Count II of her Complaint,

prevents the election officials from knowing how the voter has cast the ballot. In uncontested elections, since no provision is made for a negative vote generally, no harm is done if nobody votes in that election. There is no requirement in any of the United States that any person vote in any election. The interest of the State of Illinois is in protecting the multi-political party system to accommodate the integrity of all political parties and membership therein, *Lippitt* v. *Cipollone,* supra, and to accommodate the right of association, programs of political action, promotion of political ideas and the right to vote *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5 (1968). The Illinois Election Code taken as a whole carries out the ideals and interest of the State of Illinois and of the United States.

It appears from reading plaintiff's complaint that plaintiff relies on Section 2281 and 2284 of Title 28 U.S.C. to justify the relief asked in plaintiff's complaint. Section 2281 and 2284 of Title 28 U.S.C. require that a substantial Constitutional question be raised to justify the convocation of a three judge court. It is first of all a function of the District Judge to whom an application is made to determine whether or not a "substantial" Constitutional question has been raised. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 82 S. Ct. 1294 (1962); *Swift & Company* v. *Wickham,* 382 U.S. 111, 86 S. Ct. 258 (1965). The fact that a three judge court has been convened, however, does not eliminate the necessity for a "substantial" Constitutional question to confer jurisdiction and the three judge District Court should dismiss the action where a three judge court was not required. *Swift and Company* v. *Wickham,* supra. The

Federal Constitution does not guarantee and protect rights and privileges of State citizenship. *Snowden* v. *Hughes,* 321 U.S. 1; 64 S. Ct. 397 (1944). In view of the comments of the United States Supreme Court in *United States* v. *Arizona,* supra, there can be no question that participation in a political party primary is an incident of State citizenship. Plaintiff's complaint should be referred back to a single judge for lack of a substantial constitutional question.

Conclusion

In light of *United States* v. *Arizona,* supra, *Williams* v. *Rhodes,* supra, and *Lippitt* v. *Cipollone,* supra, plaintiff has not established a claim upon which relief may be granted in the district court of the United States. Indeed, plaintiff has not established that this is properly a case before the United States District Court, that court being the court of limited jurisdiction. Clearly there is no sufficient showing to warrant summary judgment on behalf of plaintiff. The right to vote in a primary election is an incident of State citizenship and the Federal Constitution does not guarantee and protect rights and privileges of state citizenship. *Snowden* v. *Hughes,* supra. Plaintiff's complaint raises no substantial constitutional question so that a three judge court was not required. The three judge court should refer this matter to a single district judge. *Swift & Company* v. *Wickham,* supra.

Accordingly, defendants urge this court to deny plaintiff's motion for summary judgment in favor of plaintiff and refer this court to a single district court.

Defendants further urge that this cause be dismissed for want of jurisdiction or in the alternative that this

cause be dismissed for failure to state a claim upon which relief may be granted.

Respectfully submitted,

Stanley T. Kusper, Francis P. Canary and Marie Suthers as the Chicago Board of Election Commissioners

By /s/ Aldus S. Mitchell
/s/ Sophia H. Hall
/s/ Howard M. Miller

EXHIBIT "A"

SUPREME COURT OF THE UNITED STATES

Thomas W. Lippitt v. *Joseph A. Cipollone, et al.*

On Appeal from the United States District Court for the Northern District of Ohio

No. 71 5729. Decided January 17, 1972

The judgment is affirmed.

MR. JUSTICE DOUGLAS, dissenting.

In the 1970 Ohio primary election, appellant voted as a Republican and was a candidate for the Republican nomination to the House of Representatives from the 22d Congressional District of Ohio. Political allegiances change and, in the upcoming election, appellant seeks the nomination to Congress of the American Independence Party. He is prevented from pursuing this nomination, however, by an intricate statutory scheme. Central to this scheme is a statute which provides, with

various exceptions not relevant here, *e. g.*, Ohio Rev. Code § 3517.013 *et seq.* (Page Supp. 1970), that "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Ohio Rev. Code § 3513.191 (Page 1960). Other provisions also being attacked require those working for primary candidates or signing their nominating petitions to be members of the party in which nomination is sought, *id.*, § 3513.05.

No one disputes that Ohio's statutory scheme prevents appellant from seeking the nomination of the party of his choice before 1974. Appellees, however, defend this limitation of freedom, saying that it is necessary to ensure "the formation of recognizable, relatively stable political parties with their own leadership, goals and philosophies." They conclude, "The protection of these purposes is a legitimate State concern." The District Court adopted this rationale,

> "The compelling State interests [*sic*] the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent 'raiding' of one party by members of another party and to preclude candidates from '. . . altering their political party affiliations for opportunistic reasons.' *State ex rel. Bible* v. *Board of Educations*, 22 O. S. 2d 57 (1970). Protection of party membership uniformly applied to all parties cannot be characterized as 'invidious discrimination' as defined in *Williams* [v. *Rhodes*, 293 U.S. 23 (1968)]." ..... F. Supp. ....., ... (ND Ohio 1971).

Not only does the denial of appellant's right to seek the nomination of the American Independence Party in

1972 seriously impair his right of political expression, but the "compelling state interest" advanced by the appellees and accepted by the court below seems alien to our political and constitutional heritage. The right to run for public office seems a fundamental one.

The Ohio laws deny appellant that liberty, insofar as the 1972 election is concerned.

While I doubt that any state interest can be so compelling as to justify an impairment of associational freedoms in the area of philosophy—political or otherwise*—the reasons advanced by the court below require an answer. The District Court and the appellees see a compelling state interest in the need to preserve the status quo and to preserve political stability. This interest, it is argued, is secured by creating impediments to changes in party allegiance. Our history is replete with instances in which politicians—having become disenchanted with their previous parties or perhaps only for the "opportunistic" reasons condemned by the court below—have changed from one party to another. This list includes Teddy Roosevelt, Strom Thurmond, Wayne Morse, John Lindsay, George Wallace, and a host of others. Though these breaks from past political ties

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* In *Williams* v. *Rhodes*, *supra*, at 39-40, I said,

"Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. It is unnecessary to decide whether Ohio has an interest, 'compelling' or not, in abridging those rights because 'the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.' Appellees would imply that 'no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgement.' I reject that suggestion." (Citations omitted.)

add vitality to our political process, Ohio makes it very difficult.

I would note this appeal and put the case down for early argument.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE POWELL:

We are three of the four who dissent from the affirmance of the judgment of the District Court in this case. In the circumstances present here, however, we do not insist that the case be set down for oral argument.

OPINION

(Filed March 9, 1972)

Before SWYGERT, *Chief Circuit Judge,* MAROVITZ and BAUER, *District Judges.*

SWYGERT, *Chief Judge.* This case consolidates two actions, each of which attacks the constitutionality of sections 7-43(a), (d), and 7-44 of Chapter 46, Ill. Rev. Stat. Sections 7-43(a) and 7-44 condition voting in any primary upon a public declaration of party affiliation. Section 7-44 prohibits voting in the primary of one party if the voter has voted in the primary of another party within the preceding twenty-three months.[1] Plaintiffs seek

[1] Sections 7-43 and 7-44 provide:

§ 7-43. No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

declaratory and injunctive relief under 28 U.S.C. §§ 1343, 2281 and 42 U.S.C. § 1983.

The parties bringing the action are qualified Chicago and Lake County voters (plaintiffs Pontikes and Lombardo, respectively) who had voted in one party's primary in February 1971 and who now seek to vote in a different party's primary in March 1972, and a Lake County voter (plaintiff Klaetsch) who, though eligible to vote in any primary, challenges the restrictions that will attend her voting in March. Defendants are those officials responsible for the conduct of primary and general elections in each area, the Commissioners of the Chicago Board of Elections and the Clerk of Lake County.

The complaint in *Pontikes* v. *Kusper* was filed in district court in September 1971 and that in *Klaetsch* v. *Stern* in October 1971. A request for a three-judge court was subsequently granted, and the two actions were consolidated. The plaintiffs principally charge that section 7-43(d), which outlines the so-called "twenty-three month" rule, is unconstitutional because it impinges upon the right to vote and the right of association. They claim further that sections 7-43(a) and 7-44, the sections requiring a declaration of party affiliation, should fall as violative of the right to privacy, the right to vote, the right of association, and the provisions of the Voting

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(d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held. . . .

• • •

§ 7-44. Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges. . . . No person who refuses to state his party affiliation shall be allowed to vote at a primary.

Rights Act of 1960, 42 U.S.C. § 1971. They seek summary judgment based on these contentions. The defendants move to dismiss the complaint on the ground that no "case or controversy" has been presented, that no substantial federal question has been raised to vest jurisdiction in this court, and that even if jurisdiction were sustained, the federal courts should abstain from exercising it. We find no merit to these contentions and accordingly, we deny the defendants' motion. We grant the plaintiffs' motion for summary judgment only where section 7-43(d) is concerned. We find no basis for overturning sections 7-43(a) or 7-44.

I

The issues raised in the defendants' motion to dismiss have been considered and rejected by this court and others. Numerous cases have held that constitutional attacks on primary regulations by those immediately affected, prior to the primary date, do meet the requirements of a "case or controversy." *See Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Rosario* v. *Rockefeller,* No. 71-C-1573 —*Eisner* v. *Rockefeller,* No. 71-C-1621 (E.D. N.Y., filed Feb. 10, 1972); *Bendinger* v. *Ogilvie,* No. 71-C-2037 (N.D. Ill., filed Nov. 16, 1971); *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971).

Moreover, this action raises several significant federal questions, principally the impact of the challenged statutes on the plaintiffs' right to vote and right of association. In *Bendinger* v. *Ogilvie, supra,* which involved a statute barring candidates from running in a primary who had voted in another party's primary within the preceding twenty-four months, this court did not contest the

fact that primaries were subject to federal constitutional standards and considered only whether these standards were met. Similarly, jurisdiction was properly found in two recent federal cases which dealt with primary election procedures comparable to those at issue here, *Gordon* v. *Executive Comm. of the Democratic Party of the City of Charleston,* No. 71-852 (D.S.C., filed Sept. 22, 1971), and *Rosiaro* v. *Rockefeller, supra.*

Finally, we see no reason to abstain from exercising our jurisdiction. There are no unsettled questions of state law at issue here which would require state court interpretation. The statutes involved are unambiguous. The only point in question is their conformity to the federal Constitution, a question we are mandated to resolve.

II

The plaintiffs' attack against section 7-43(d) is grounded upon both the right of association and the right to vote. We agree that the "twenty-three month rule" substantially burdens plaintiffs' right to vote in derogation of Article I, § 2 of the Constitution. Those who have voted in the March 1971 primary of one party are now deprived of the right to vote in the March 1972 primary should they choose to switch parties at this time. Even voters eligible to vote in any primary this March are affected since they are forced to choose between their right to vote and their right to freely affiliate within the twenty-three month period following the election. The defendants counter that the right to vote protected by the Constitution does not include the right to vote in a primary. They characterize primaries as the purely internal procedures of private organizations. We find the

holding in *United States* v. *Classic,* 313 U.S. 299 (1941), dispositive:

> Where the state law has made the primary *an integral part of the procedure of choice,* or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. 313 U.S. at 318. (Emphasis added.)

See Williams v. *Rhodes, supra*; *Moore* v. *Ogilvie,* 394 U.S. 814 (1968); *Gray* v. *Sanders,* 372 U.S. 367 (1962); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Gordon* v. *Exec. Comm., supra*; *Rosario* v. *Rockefeller, supra.* Since in Illinois, primaries are subject to extensive state regulation, Ill. Rev. Stat. ch. 46, they fall squarely within the test of *Classic.*

In addition, we agree that the contested statute represents a significant incursion on the plaintiffs' rights of free association. It has the effect of attaching penalties to affiliation and disaffiliation since voters may not change parties during the twenty-three month period without being disenfranchised in the party primary of their choice.

Where a deprivation of the right to association or the right to vote is at stake, the statute will only be upheld if the state proves that it serves a "compelling" state interest. In *Williams,* the Court considered a challenge to several Ohio election laws which were claimed to make it "virtually impossible" for a new political party to be placed on state ballots for the purpose of choosing electors pledged for particular presidential or vice-presidential candidates. The Court stated:

> In determining whether the State has power to place such unequal burdens on minority groups where

> rights of this kind are at stake, the decisions of this court have consistently held that 'only a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' 393 U.S. at 31.

Kramer v. *Union Free School District,* 395 U.S. 621 (1969), used a "compelling state interest" standard where only a deprivation of the right to vote rather than of first amendment rights was charged. More recently this court in *Bendinger* v. *Ogilvie, supra,* applied the identical test. *See Rosario* v. *Rockefeller, supra.*

The interest which section 7-43(d) is claimed to protect is the state's interest in guarding against any distortions of the electoral process in general and in maintaining the integrity of the two-party system in particular. The statute serves these interests by preventing a practice known as "raiding." "Raiding" occurs when members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. But the statute sweeps too broadly, impeding both deceptive conduct and constitutionally protected activities. If section 7-43(d) were not in effect, massive party switching could occur either because of the well-planned raiding on one party's primary by members of another party, or because of massive dissatisfaction with the prevailing policies of an existing party. The state's interest upon which this statute is grounded could be characterized as "compelling" only if the former alternative is more likely to occur than the latter, or if raiding constitutes a more important danger than the danger to constitutionally protected rights however often it occurs. There is no evidence to

indicate that raiding is more likely to take place than "honest" switches of affiliation. Forty-four states do not impose post-election restraints on changing affiliation. This would indicate that raiding is not a serious threat to the multi-party system.

Moreover we cannot say that the mere possibility of raiding is more important than the potential deprivation of first amendment and voting rights this statute effects. The state's interest in maintaining a multi-party system has been found to be "compelling" at the primary level only where constitutional claims were raised by *candidates* who were barred from running in one party's primary when they had voted in another party's primary within the previous two years, *Bendinger* v. *Ogilvie, supra,* or within the previous four years, *Lippitt* v. *Cipollone,* No. 71-5729 (U.S., filed Jan. 17, 1972), and by *candidates* who were required to sign oaths affirming their support for the presidential and vice-presidential candidates of the party to which they claimed allegiance, *Ray* v. *Blair,* 343 U.S. 214 (1952).

Where—as in the instant case—the state's interest is weighed against the constitutional claims of political party *members,* the outcome has been different. In *Williams* v. *Rhodes, supra,* burdens on the right to form a party capable of effectively competing with other parties could not be justified by the state's interest in promoting a multi-party system. In *Rosario* v. *Rockefeller, supra,* and *Gordon* v. *Exec. Comm., supra,* state laws which affected constitutional rights in the same fashion as the Illinois law also fell where the identical justifications were offered. Indeed, dicta in *Bendinger* v. *Oglivie, supra,* specifically distinguish between the associational and voting

rights of members of political parties and the rights of candidates:

> The state's interest in limiting candidates from switching parties, as detailed above, is greater than its interest in limiting voters from switching parties. The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election.

These cases cannot be distinguished by characterizing the state's interest in section 7-43(d) in terms of the protection of the electoral process rather than the preservation of the two-party system. The difference is semantic. Distortion of the electoral process would here be occasioned by a distortion of the procedures of candidate selection, namely, the selection procedures of a two-party system.

We find none of the justifications offered by the state to be sufficiently compelling to outweigh the costs to constitutionally protected rights. The rights to free association and to the vote are at least as important today as they were at the time the Constitution was written. The pace of political change has greatly accelerated. A wide variety of important political events are likely to take place ever during the two-year period in which voters must affiliate with a single party or be disenfranchised. Moreover, primaries held during this period are likely to reflect a broad range of important issues.

The Illinois statutes provide for elections in each of the even numbered years for various state and county offices. These elections coincide with the elections for President, Vice-President, and members of Congress. Other primary elections are provided for, including special elections to fill certain vacancies, township elections, and city and village elections. These are conducted in the so-called "off years," the period between the regular primary and general elections in the even numbered years. This scheduling, coupled with the twenty-three month rule of section 7-43(d), has the effect of precluding a voter from participating in a primary of one party in a township, city, or village election and another at the regular primary level. We find this result untenable. Whatever are the advantages of maintaining party stability for elections at any given level of government, they do not apply when national, state, and local contests are considered together. A vote ought not be required to hold himself bound to a single party on every level of government.

III

Plaintiffs claim that sections 7-43(a) and 7-44, which require a declaration of party affiliation prior to voting, burdens their rights to privacy, to freely associate, and to the vote, in addition to violating the Voting Rights Act of 1960, 42 U.S.C. § 1971. We do not agree. The voter's choice of candidates in a single party's primary is not disclosed. The only public declaration he is called upon to make is to choose which party primary to participate in. Any imposition this places on the voter is minimal. Moreover, whatever burden is suffered is outweighed by the state's "compelling" interest in preventing election

fraud. Membership in a political party may be distinguished from membership in any other organization because of the role of the state in regulating and enforcing party selection procedures. *Cf. NAACP* v. *Alabama*, 357 U.S. 449 (1958). Section 7-43(a) and 7-44 not only serve to enforce the twenty-three month rule, as the plaintiffs claim, but also to buttress the requirement that voters participate in only one part's primary at a time.

The motion of defendants to dismiss the complaint is denied, and the motion of plaintiffs for summary judgment is granted insofar as section 7-43(d) is concerned. Section 7-43(d) of the Illinois Revised Statutes, Chapter 46, is hereby declared to be violative of the Constitution of the United States and is null and void. Defendants, their officers, agents, servants, employees, and attorneys, and those persons who act in active concert or participation with them are permanently enjoined, without bond, from executing or enforcing section 7-43(d) of the Illinois Revised Statutes, Chapter 46.

Enter: /s/ Luther M. Swygert
United States Circuit Judge
/s/ William J. Bauer
United States District Judge

Dated: March 7, 1972

DISSENTING OPINION

MAROVITZ, *District Judge*. I dissent not because I disagree with the majority's characterization of the right to vote and freely associate or with the "compelling state interest" test that ought to be employed in determining whether or not an unconstitutional infringement of those

rights has taken place but rather because having applied that test to the present situation, unlike the majority I have found no such infringement.

[I might note here that I fully concur in the jurisdictional findings of the majority; that a "case or controversy" does exist; that a substantial federal question has been raised; and that abstention would be improper in this case. The law is clear on these points and has been adequately documented by the majority. See Majority Opinion, *supra*, pp. 4-7.]

The crux of the majority opinion is based on the wholly valid proposition that any state infringement of the right to vote must be grounded in a "compelling interest" whose objective fully justifies tampering with rights so fundamental and hallowed as the right to vote and freedom of association. Indisputably the right to vote lies at the very heart of the democratic process and is a fundamental element in the principles by which this Nation is governed. Although the manifestation of this right has gone through vast political, social, demographic and geographic transformations over the years assuming the various shapes and forms suitable to the practicalities and exigencies of a particular era, its essential core stripped of historical and periodical gloss—the right of all citizens to choose freely without governmental interference—has always remained the same. It is the purity of this core that is protected from unwarranted and unjustified state intervention. Yet one need only look at the election code of any state in the Union today to realize that some sort of regulatory election procedure is not only justified and warranted but is moreover essential to preserve voting purity and

to prevent electoral anarchy. What must be pinpointed, then, is that fine line between the permissible and the impermissible.

It is because I concur in the majority's general view of the "compelling interest" test and because I do not wish my dissent to be misconstrued in any way as adulterating or altering that test or as permitting alleged violations of voting rights to be scrutinized with any less care than they are now being tested, that I find it necessary to briefly trace the development of the law in voting rights cases.

There are basically two criteria by which the constitutionality of an election statute can be judged, one objective and the other subjective. The objective test is simply the comparison of the questional regulation with constitutional dictate and previous pronouncements of the Supreme Court. If the Supreme Court has specifically prohibited a certain practice there is no doubt that the state regulation which directly conflicts with that prohibition must fall. But the law has never been so precedentially precise as to cover all situations in all times and quite often a specific procedure upon which the Constitution and the Courts have not yet spoken is attacked. Thus, parallel with the development of specific prohibited categories of conduct and growing out of Supreme Court usage, there has evolved a subjective test that is used for those instance that do not fit into any preconceived constitutional slots. This subjective test, as used in election cases has matured from the "rational basis" to the "compelling state interest" test.

In the earlier years of our country the Congress and the Courts were concerned with the formative problem of

expanding a basically limited suffrage to that of universal suffrage. The most blatant and obviously unconstitutional disenfranchisement was the quantitative exclusion of larger segments of the population such as black people and women. Both of these exclusions were cured by constitutional amendments, the latter occurring within our time, and quite understandably a state cannot now claim that it has a "compelling interest" to exclude those groups. Disenfranchisements of this sort are easily discernible and fit into clear-cut constitutional categories.

In recent years cases dealing more with the qualitative rather than quantitative aspects of the vote have reached the Supreme Court. In these instances there was no outright denial of the right to vote but rather the question raised was whether the right of suffrage is denied by dilution or debasement of a vote cast by malapportionment. In *Reynolds* v. *Sims*, 377 U.S. 533 (1964) the apportionment of the Alabama Legislature's two houses was challenged on equal protection grounds.

See also *Baker* v. *Carr*, 369 U.S. 186; *Gray* v. *Sanders*, 372 U.S. 368; *Wesberry* v. *Sanders*, 376 U.S. 1; *U. S.* v. *Mosely*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299; *Ex parte Siebold*, 100 U.S. 371; *U. S.* v. *Saylor*, 322 U.S. 385; *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461.

In the last decade the courts have also been faced with the narrower more limited exclusions of smaller segments of the population. Often these lesser restrictions are of a very localized and regional nature unlike the

nationwide exclusions of a century ago. At times these exclusions such as poll taxes or literacy tests come cloaked in the guise of a general regulation but in reality and racially motivated having a more pronounced affect on minority groups; other times the state is simply convinced that a certain regulation is desirable and permissible. See for example: *Carrington* v. *Rash,* 380 U.S. 89 (1965): State may not deny the opportunity to vote a bona fide resident because he is a member of the armed forces. *Harper* v. *Virginia Board of Election Commissioners,* 383 U.S. 663 (1966): State may not impose a poll tax; *Kramer* v. *Union Free School District,* 395 U.S. 629 (1969): State may not require citizens to own or lease taxable realty in order to vote in a local election. See also *City of Phoenix* v. *Kalodziejski,* 399 U.S. 204 (1970); *Evans* v. *Cornman,* 398 U.S. 419 (1970): State cannot refuse to permit persons living in a federal enclave to vote; *Affeldt* v. *Whitcomb,* 319 F. Supp. 69 (Three Judge Court, N.D. Ind. 1970): State may not impose a one year residency requirement. See also *Hadnott* v. *Amos,* 320 F. Supp. 107 (Three Judge Court, M.D. Ala. 1970), *aff'd.* 401 U.S. 968 (1971) (one year residency requirement struck down) and *Keppel* v. *Donovan,* 326 F. Supp. 15 (Three Judge Court, D. Minn. 1970) (6 month requirement struck down).

Thus these specific practices have explicitly been outlawed by the Supreme Court and some lower Federal Courts. Yet as indicated earlier an implicit criteria has developed out of these cases to be used in those areas yet uncharted by the Supreme Court.

The District Court in New York in *Rosario, et al.* v. *Rockefeller, et al,* 71 C 1573 (Slip Op. February 10, 1972)

spent a great deal of time in tracing the development of the subjective "compelling interest" test. In *Reynolds* v. *Sims, supra* the Supreme Court said that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 377 U.S. at 561-62. A year later in *Carrington* v. *Rash,* 380 U.S. at 96 the Court stated that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State" and in 1966 in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 at 670 the Court indicated that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and confined."

The Court in *Rosario* went on to say:

> "At the October Term of 1968, the Supreme Court continued to enlarge the divergence between the treatment to be accorded most state statutes when attacked as violating the Equal Protection Clause and the treatment to be accorded those statutes specifically affecting the right to vote. In *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5 (1968), the Court was presented with a challenge to a set of Ohio statutes which made it extremely difficult for any party other than the Democratic or Republican Party to achieve the status of an established party and to have its name and its candidates placed on the ballot in the general election . . . The test applied by the Court, however, was not whether any merely rational basis could be imagined to justify the enactment of the statutes, but whether or not there was any *compelling* state interest to justify their existence . . .
>
> The Court drew support for the use of this test from a case which had not involved the right to vote,

but was solely concerned with First Amendment rights of association . . .

The Court concluded by saying that "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate," and ". . . the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause," (393 U.S. at 31 and 34, 89 S. Ct. at 11 and 12).

The opinion in *Williams* v. *Rhodes, supra,* left one in some doubt as to whether the compelling state interest test would be applied to cases involving only voting rights and having no First Amendment overtones. Later in that same Term, however, the Court decided *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S. Ct. 1886 (1969), and did much in the *Kramer* opinion to clarify its view of the appropriate test to be used when statutes involving the right to vote are challenged on equal protection grounds.

In *Kramer,* the challenged statute restricted the vote in local school board elections to those otherwise qualified voters who were either parents of children attending schools within the local public school system or were owners or lessees of real property within the school district . . . The Court held that the compelling state interest test applied to the voting restrictions in issue, and, finding no such interest, voided the statute . . . The Court said:

> Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. *Carrington* v. *Rash,* 380 U.S. 89, 91, 85 S. Ct. 775, 777, 13 L. Ed. 2d 675 (1965); *Pope* v. *Williams,* 193 U.S. 621, 24 S. Ct. 573, 48 L.

> Ed. 817 (1904). Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. [Footnote omitted.] Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (395 U.S. at 625-27, 89 S. Ct. 1888-90). [Emphasis in original.]
>
> It is evident from the Court's opinion in *Kramer* that once a state has imposed basic voting requirements of citizenship, age, and residency, all further requirements (which by their nature must be viewed as restrictions) must of necessity be supported by a compelling state interest. This in effect places the burden of proof on the state, the reverse of the situation where the rational basis test is applied. The basic requirements of citizenship, age and residency, are to be tested, when they are challenged, by the traditional, "rational relation" test, used in garden-variety equal protection cases."

We therefore have before us a clearly defined subjective test to apply in our case given the absence of any specific Supreme Court pronouncement on the constitutionality of a 23-month rule. What must be determined is whether the State of Illinois has carried the burden in proving that it has not merely a rational basis for prohibiting voting in a primary of one party by a citizen who has voted within 23 months in the primary of another party but that it has a "compelling interest". What must also be kept in mind is that voting rights are not absolute and that there is a degree of constitutional in-

fringement short of invidiousness that is permissible as long as the infringement is compelled by a state interest and affects the rights of the voters as little as practicable under the circumstances. This in fact was part of the rationale of *Bendinger, supra,* at p. 4:

> "Before a state can place any restrictions upon the freedom to associate freely and to vote, it must be shown that a compelling state interest justifies such regulation. *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *NAACP* v. *Button,* 371 U.S. 415 (1963); *Jackson* v. *Ogilvie, supra. Further it must be shown that the state statute in question is not only as fair as possible but also that it infringes upon the First Amendment rights of those affected as little as practicable under the circumstances. Williams* v. *Rhodes, supra* at 32, 33; *Briscoe* v. *Kusper,* 435 F. 2d 1046 (7th Cir. 1970); *Jackson* v. *Ogilvie, supra.*" [Emphasis added]

The compelling interest asserted by the State is the prevention of inter-party "raiding" that would result from open primaries. Raiding occurs where members of one party vote in the primary of the opposition party in the hopes of electing a weak candidate or a "straw man" who could easily be defeated by the candidate of their true party in the general election. This might happen where the candidate of their true party is running unopposed in the primary and their votes are not needed; where a certain candidate in their party is far stronger than all challengers making their votes unnecessary and better utilized in the primary of the other party; or where members of one party in a certain district far outnumber the members of the opposition party and a great portion of the votes are expendable and can be allocated to set up a "straw man".

That such "raiding" can occur has been recognized by several Courts. In *Bendinger* v. *Ogilvie,* 71 C 2037 (N.D. Ill.) a Three Judge Court dealt with the Illinois statutory requirement that in order to be an eligible candidate in a political party primary a person cannot have "requested a primary ballot of any other party at a primary election held within two years of the date on which the petition must be filed." Ill. Rev. Stat. Ch. 46 Section 8-8. The Court found the statute constitutional and said:

> "In addition to the policy of limiting the elective process to manageable and realistic proportions, there are even more serious and compelling reasons underlying this legislation. The most important of these is the prevention of the subversion of the entire elective process. The keystone of our democracy is the party system of politics. Before any general election, each party must go through its manpower resources in order to find a candidate who not only represents a consensus of the opinions of the members of his own party, but will be appealing to a majority of the entire voting population as well. If there were no "24 month rule", then this system could be thrown into total chaos. For instance, suppose Party A had a strong candidate for a certain post and it was clear that he would receive his party's nomination with votes to spare. Without the deterrent effect of the "24 month rule" it would be a relatively simple matter for Party A to have one or more of its party regulars run in Party B's primary in the hope that one would win the Party B primary and then put up little or no opposition to the Party A candidate in the ensuing general election. The resulting confusion and subversion of the elective process is obvious, and, without the "24 month rule", could not be controlled.

There is another obvious reason which is clearly compelling and which underlies this legislation. It, too, is grounded in the protection of the elective process. That is the question of protecting the party system as we know it. Without rules like the "24 month rule", party swapping and changing might conceivably become so prevalent that the average political party could no longer function properly. With the resulting disruption of party unity and discipline, a political party would be unable to decide who to support because the person whom they did or did not support today could be on the other side of the aisle tomorrow. Thus, it is obvious that the "24 month rule" protects the elective process from subversion from many sides and thereby serves to promote the most compelling of state interests."

The Court stopped short of applying this same compelling interest to voter rather than candidate cases and in fact indicated that the case might be different in the voter situation. *Bendinger,* however, was a candidate case and the Court had no real opportunity to adequately consider the "raiding" implications in voter cases. This Court on the other hand has had ample opportunity to consider all the evidence and to hear oral argument on this precise issue and I find that the State's prevention of "raiding" is as compelling an interest in voter cases as it is in candidate cases and that the State has met all of the requirements of the "compelling interest" test as set out above. (See also *Gunderson* v. *Ghent, et al.,* 69 C 43 (W.D. Ill. Slip. Op. February 2, 1970) which also upheld the statute regarding candidates on the grounds that "it reflects a State policy to foster and lend stability to party structure and political organization".)

In *Lippitt* v. *Cipollone*, C 71-667 (N.D. Ohio Slip Opinion, November 5, 1971) the Court also considered a statute regulating candidacy based on party affiliation. The Court said:

> "The compelling State interests the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent "raiding" of one party by members of another party and to preclude candidates from" . . . altering their political party affiliations for opportunistic reasons." *State ex rel Bible* v. *Board of Elections*, 22 O.S. 2d 57 (1970). Protection of party membership uniformly applied to all parties cannot be characterized as "invidious discrimination" as defined in *Williams*. The United States Supreme Court has recognized the need to "protect a party from intrusion by those with adverse political principles" to be a legitimate purpose for said legislature. *Ray* v. *Blair*, 343 U.S. 214 (1952).
>
> The requirement of the challenged statutes insuring party integrity and party political affiliation, together with the exemptions enacted to aid emerging political parties, are simple, reasonable, and uniform procedures designed to accomplish the desired result."

The U. S. Supreme Court in *Lippitt* v. *Cipollone*, 71-5729 (Slip. Op. January 7, 1972) in affirming the lower Court decision without opinion implicitly conceded the possibility of raiding and recognized its prevention as being a valid State interest. Preventing raiding is a valid compelling interest of the State and is as applicable, I believe, in voter cases as it is in candidate cases.

Juxtaposing this compelling interest of the State against the temporary deprivation of the plaintiffs' right

to vote in this particular primary and considering the fact plaintiffs are not deprived of their right to vote since they are perfectly free to vote in the primary of the party for which they voted in the February 1971 primary, I find no basis for overturning these statutes.

While the majority finds that "[t]here is no evidence to indicate that raiding is more likely to take place than "honest" switches of affiliation" and "that raiding is not a serious threat to the multi-party system" (Majority Opinion, p. 8) I am compelled by the evidence and Illinois political circumstance to believe that such a threat is a very real and imminent one absent the statute in question and not merely one in the realm of the hypothetical or speculative. Thus my application of the compelling interest test to the present situation produces a different result than that of the majority based on the single, critical factor of the substantiality and probability of inter-party raiding.

We might note here that the result in *Rosario, supra* was the invalidation of a procedure that was also designed to prevent raiding. In that case however the "enrollment box" procedure failed to meet the "compelling interest" test because it was not the least drastic measure available to accomplish the objective sought and it was not proven that the system was necessary for its accomplishment. The Court did not however discount the possibility of raiding but determined that there was a less invidious method of preventing it. I, however, believe that the sweep of the 23-month rule is narrow enough to conform with the least invidious and compelling interest test.

Furthermore I do not believe that the contrary decision of *Gordon* v. *Executive Committee of the Democratic Party of Charleston*, 71 C 852 (D.S.C. Slip. Op. September 28, 1971) forecloses my opposite finding. The statute in that case also prevented a citizen from voting in the primary of another party and the Court invalidated it on the grounds that it was arbitrary and was not justified by a compelling State interest. What must be understood is that the "compelling interest" test is of an acutely subjective nature and given the fact that political climates are as variable as geographic climates a State interest that might be less than compelling to a Judicial panel in one locale may take on compelling proportions to a panel in a different district.

I need not elaborate on the constitutionality of the Section 7-43(a) and Section 7-44 regarding the declaration of party affiliation since defendants themselves admit that it is the means by which the 23-month restriction is enforced. Having found that the 23-month rule is constitutional we likewise find that the same compelling State interest of "raiding" justifies the declaration of party affiliation and that it does not violate the First and Fourteenth Amendments, or the Voting Rights Act. In addition the majority, which has found the twenty-three month rule unconstitutional has nevertheless upheld the declaration of party affiliation portion of the statute on the grounds that the infringement on the voter is minimal and that "whatever burden is suffered is outweighed by the state's 'compelling' interest in preventing election fraud", and that furthermore it is also necessary "to buttress the requirement that voters participate in only one party's primary at a time". (See Majority Opin-

ion at pp. 11-12.) Thus even if we were not to consider raiding a threat we would nevertheless be bound to find the declaration portion of the statute constitutional based on the majority's reasons.

To summarize, then, in applying the current compelling interest test as designated for voting rights cases I have found that both the 23-month rule and the declaration of party affiliation is fully justified by the interest of the State in preventing the inter-party raiding that would result absent these restrictions; that the infringement of the plaintiffs' rights is minimal given its temporary nature and the existence of alternate electoral avenues; and that these are the least drastic measures available.

In finding so I need not base my decision solely on the grounds that the preservation of party integrity and the multi-party system is a proper state interest as *Bendinger, Gunderson* and *Lippitt* v. *Cipollone* do indeed indicate. The argument that this Court ought not be instrumental in preserving those artificial procedures and extra-constitutional encumberances, such as party politics, that have been engrafted wisely or unwisely by historical development upon the purity of the American electoral process might be a more valid one were we being asked to take the initiative in instituting such procedures where they did not before exist. Thus if political parties as such and their accompanying procedures were nonexistent it might be validly posited that it is beyond the province of this Court to lend assistance in their creation. This, however, is not a case where we are being asked by the State for a declaratory judgment or injunctive relief that would create or put into effect party system rules such as the 23-month or

party affiliation regulations. Rather our task has been to analyse and weigh, with the prescribed constitutional criteria, an already existing law that the legislature in its considered judgment has determined to be the best method available for the preservation of that electoral purity that both sides in this case so earnestly desire. It is far beyond the role intended for this Court to adopt the posture of a microcosmic legislature that would design better methods of preserving electoral purity where an adequate statute that meets the compelling interest test has already been promulgated by the state legislature. In attempting to preserve that purity as embodied and manifested in the statutes under attack it would be remiss of this Court not to take judicial notice of the inescapable fact that parties and party lines do indeed exist and that they are inseparable elements of the electoral scene. We would be equally remiss if we were not cognizant of the fact that party allegiances are powerful and can quite easily lead to nefarious inter-party raiding absent any restrictions. [See Dreiske, *GOP Primary Ploy*, Chicago Sun-Times, March 1, 1972, p. 40 which indicates that Republicans are being urged on a large scale to cross over into the Democratic Party on March 21, 1972 since there are no real contests in the Republican Primary. The article indicates that an even greater crossover would take place were it not for the twenty-three month rule.] The adoption of such a position when reality so compels and the circumstances so dictate does not mean that I take a more jaundiced or more untrusting view of the voting public than does the majority but rather indicates that I believe the phenomenum of raiding to be an inescapable outgrowth of the competitiveness engendered by the multi-party system

and that that competitiveness ought not go so far as to inject any impurities or fraud into the electoral process as it manifests itself on general election day. My determination, then, that the statute is not unconstitutional is as much motivated by my desire to preserve the multi-party system as it is to prevent the shambles that could conceivably result in the general elections, irrespective of party considerations, absent any phophylactic measure to prevent raiding.

I would therefore find Sections 7-43 and 7-44 constitutional and dismiss the Plaintiff's case. Being in the minority I must be contented with a vigorous dissent.

Enter: /s/ Abraham Lincoln Marovitz
Judge

Dated: March 7, 1972

ORDER OF MARCH 9, 1972

(Received March 10, 1972)

The Three Judge Court Having Taken These Two Cases Under Advisement Has Decided By A Vote Of Two To One That Section 7-43(d) Of The Illinois Election Law Which Prohibits Voting In A Party Primary By One Who Has Voted In The Primary Of Another Party Within Twenty Three Months Is Unconstitutional. Chief Judge Swygert And District Judge Bauer For The Majority Have Found That The Twenty-Three Month Rule Infringes On The Right To Vote And The Right To Freely Associate And That The State Has Failed To Prove That It Has A Compelling Interest In Maintaining This Statute.

Judge Marovitz Dissents From The Holding That The Twenty Three Month Rule Is Unconstitutional And Would Uphold The Statute On The Grounds That The State Does Have A Compelling Interest In Preventing Inter-Party Raiding And The Crossing Of Party Lines That Would Result In The Absence Of Such A Rule.

All Three Judges Concur In The Finding That The Declaration Of Party Affiliation As It Appears In §7-43 (a) And §7-44 *Is Constitutional* Because Its Affect On Voters Is Minimal And It Is Justified By The State's Compelling Interest To Prevent Voter Fraud. Judge Marovitz Holds In Addition That It Is Necessary To Effectuate The Twenty Three Month Rule Which He Would Uphold.

Holding: ***The Twenty-Three Month Rule, § 7-43(d) Is Ruled Unconstitutional And The Declaration Of Party Affiliation Rule § 7-43(a) And § 7-44 Are Held Unconstitutional.*** **(Draft)**

Supreme Court of the United States

No. 71-1631

Stanley T. Kusper, Jr., et al.,

Appellants,

v.

Harriet G. Pontikes, et al.

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 2, 1973

71-1631

JUN 16

MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee,

and

DONNA KLAETSCH and PETER LOMBARDO,

Plaintiffs,

vs.

GRACE MARY STERN, County Clerk,

Defendant.

On Appeal From a Three-Judge District Court
Of The Northern District Of Illinois

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee,

and

DONNA KLAETSCH and PETER LOMBARDO,

Plaintiffs,

vs.

GRACE MARY STERN, County Clerk,

Defendant.

On Appeal From a Three-Judge District Court
Of The Northern District Of Illinois

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of a three-judge district court sitting in the Northern District of Illinois entered on March 9, 1972, holding that Ill. Rev. Stats.

(1971), Ch. 46, §7-43(d), is unconstitutional.[1] Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW.

A copy of the opinions of the district court are attached hereto as Appendix A.

JURISDICTION.

The suit was brought by appellee under 28 U.S.C. §§ 1343 and 2281, and 42 U.S.C. § 1983, to restrain appellants from barring appellee from voting in the Democratic primary on March 21, 1972, in the 50th Ward, 36th Precinct of the City of Chicago. On March 9, 1972, a three-judge district court with one judge dissenting, ruled that Ill. Rev. Stats. (1971), Ch. 46, §7-43(d) was unconstitutional and enjoined appellants from enforcing it. A copy of the Court's order is attached hereto marked Appendix B. A notice of appeal was filed in the district court on April 17, 1972. A copy of that notice is attached hereto marked Appendix C. The jurisdiction of the Supreme Court to review this decision by direct appeal is

[1] The opinion of the district court recites that "This case consolidates two actions . . ." Both actions, therefore, are referred to in the caption and in the Notice of Appeal. The Clerk of the District Court for the Northern District of Illinois has informed counsel for appellants, however, that there was no consolidation of these two actions.

conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969); and *Anderson* v. *Martin*, 375 U.S. 399, 84 S. Ct. 454 (1964).

QUESTION PRESENTED.

Where the State of Illinois prescribed regulations for party primaries, including qualifications of primary voters, did a three-judge district court err in holding unconstitutional, and in enjoining enforcement of, a subsection of the statutes prescribing one of the qualifications for primary voters at the suit of a single voter, to the harm and detriment of hundreds of thousands of Illinois voters, though the state courts of Illinois had never construed the statutory provisions involved as the district court did?

STATUTES INVOLVED.

Ch. 46, Ill. Rev. Stat. (1971), §§7-43 and 7-44 (Vol. 2, p. 107) provide:

Qualifications of Voters—Regulations Applicable to Primary Elections—Registration Required.

§ 7-43. Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years, shall be entitled to vote at such primary.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held.

(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by Article 6 of this Act shall be entitled to vote at such primary.

(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Article 4, 5 or 6 of this Act, when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held. [Amended by Public Act 77-1653, effective September 27, 1971.]

Voter—Party Affiliation, etc.

§ 7-44. Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges, one of whom shall thereupon announce the same in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. When Article 4, 5 or 6 is applicable the Certificate of Registered Voter therein prescribed shall be made and signed and the official poll record shall be made. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one, primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as herein provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary.

STATEMENT.

On or about September 28, 1971, appellee, Harriet G. Pontikes, filed a complaint in the District Court for the Northern District of Illinois, seeking to enjoin appellees from enforcing as to her certain provisions of the Illinois Election Code prescribing the qualifications for voters at Illinois primary elections. Appellee specifically charged that §§7-43(a) and (d) were unconstitutional. She alleged that she had voted in the primary of the Republican party in the primary held on February 23, 1971, which obviously was less than "23 calendar months" prior to the primary scheduled for March 21, 1972, and asked that appellants be restrained from enforcing those statutory provisions to bar her from voting in the Democratic primary scheduled to be held on March 21, 1972.

In fact, the primary held on February 23, 1971, was a municipal primary involving only nominations for the offices of mayor, city clerk, and city treasurer, of the City of Chicago. The primary scheduled to be held on March 21, 1972, in contrast, was a primary of the kind generally held in Illinois prior to a general election and included nominations for governor, United States senator, congressmen in each Illinois congressional district, a full slate of county officers in Cook County, members of both houses of the state legislature, and elections of delegates and alternates to the national nominating conventions of both parties, as well as election of other political party functionaries including ward committeemen of the City of Chicago.

Under the provisions of the Election Code of Illinois, such elections are conducted by the appellees as the Board

of Election Commissioners of the City of Chicago, hereinafter sometimes referred to as the Board, throughout the City of Chicago and in four adjacent suburban towns, to wit, Berwyn, Cicero, Lyons and Stickney.

There were no allegations in the Pontikes complaint indicating that this was a "class action" within the meaning of Rule 23 of the Federal Rules of Civil Procedure and the requisite findings with respect to such actions were neither sought nor made in the district court.

The cause was initially assigned to Judge Abraham L. Marovitz, one of the district judges in the Northern District of Illinois. On motion of appellee and over the objection of the appellants, who contended that the cause did not raise a sufficiently substantial federal question to warrant it, a three-judge district court was convoked. Appellants filed an answer denying the material allegations of the complaint. In conjunction with a similar action filed in the same district court against the county clerk of Lake County, Illinois, the county adjoining Cook County on the north, the three-judge court considered plaintiff's motion for summary judgment. The court upheld the constitutionality of the requirement of §7-43(a) that:

> "No person shall be entitled to vote at a primary:
> (a) unless he declares his party affiliation as required by this article; . . ." (See §7-44, supra).

The court, however, with Judge Marovitz dissenting, concluded that §7-43(d) was unconstitutional and enjoined appellants from enforcing its provisions.

The opinion of the three-judge court was not limited to the prayer of the complaint which involved only the appellee, Harriet Pontikes. As a result, in the City of Chi-

cago and the suburban towns under the jurisdiction of the Board, the provisions of §7-43(d) were not enforced in the primary held on March 21, 1972.

No Illinois court had ever squarely considered the question as to whether the 23-month provision applied to a primary preceding a general election involving state- and county-wide officers if the next preceding primary within the 23-month period had been a local municipal primary. In *Faherty* v. *The Board of Election Commissioners of the City of Chicago*, 5 Ill. 2d 519, 126 N.E. 2d 235 (1955), the Supreme Court of Illinois held that neither the Republican nor the Democratic Party was a political party "within a city . . . only" within the meaning of §7-43(d) because both of those parties are state-wide and county-wide political parties. Therefore, the court concluded that one who voted in a major party primary conducted on a state-wide basis was barred from participating in a municipal primary of another party within the 23-month period.

Whether the court would construe either section as requiring the converse, however, namely that voting in a purely municipal primary within the 23-month period would bar voting in the primary of the other major party, is not clear either from the decision in the *Faherty* case or the language of the statute. Accordingly, appellants urged on the three-judge court that this was a proper case for application of the doctrine of abstention pending construction of the Illinois statute by the Illinois courts. The three-judge court refused so to abstain from decision of the federal constitutional question though obviously if the statute were construed so as not to bar appellee from voting in the March 21, 1972, primary, there would have been no federal question.

This question of statutory construction is highly material in view of the fact that the last state-wide primary in Illinois before March 21, 1972, had been held on March 17, 1970, more than 23 months earlier.

As a result of the publicity attendant on the district court's injunction restraining enforcement of §7-43(d), thousands of persons who had formerly voted in Republican primaries voted in the Democratic primary on March 21, 1972. There was no real contest for nomination for any major office in the Republican primary. There were several such contests in the Democratic primary, however, so that the nominations in the Democratic primary may have been materially affected by these "cross-overs."

In terms, the injunction is final. Thus, only this appeal is available to test the propriety of the action of the three-judge court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

This is the case of a single individual who claimed that she would be barred under the provisions of Ill. Rev. Stats. (1971), Ch. 46, §7-43(d), from voting in the Democratic primary on March 21, 1972, because she had voted in the Republican municipal primary in Chicago on February 23, 1971. She claimed that this violated her federal constitutional rights. She also charged that the provisions of §§7-43(a) and 7-44 were unconstitutional in requiring her to disclose the party primary in which she chose to vote because they violated her right of privacy. The three-judge

district court unanimously rejected the attack on §§7-43(a) and 7-44. A majority of the court, however, construed §7-43(d) as producing the result appellee complained of, and ruled the section unconstitutional and enjoined its enforcement on the theory that the state's interest in "maintaining party stability do not apply when national, state, and local contests are considered together."

The court ruled that the statute, as it construed it, was unconstitutional and enjoined the enforcement of the statute throughout the City of Chicago, and the suburban towns under the jurisdiction of the Board, and Lake County, Illinois. The effect of the decision, of course, went far beyond the claims of the plaintiff. Indeed, it is the decision of the majority of the three-judge court which raises the substantial federal question, not the section of the Illinois statute attacked by plaintiff.

As a matter of fact, the provision of the Illinois statute held unconstitutional, even if properly construed by the majority of the three-judge court, did no more than attempt to balance competing rights of political association of persons with continuing political views, principles, and aspirations, with the rights of those desiring to change party affiliation. That is to say, in prescribing the qualifications of voters in party primaries, the Illinois legislature has attempted to protect the rights of all of its citizens who might desire to participate in party primaries. There is no evidence that the so-called 23-month qualification is an unreasonable method of protecting the rights of both those who wish to continue to vote in the primaries of the party of their choice and those who wish to shift from one party primary to another.

Interestingly, general county and state-wide elections in Illinois are held at two-year intervals. Thus, under the "23-month rule" any voter would be free to shift from one primary to another at each scheduled primary for a general election. A revised Illinois Election Code now pending before the legislature, having already passed the Senate, formalizes this arrangement to an even greater extent by requiring that all elections must be held in either May or November, and if the election is to be held in November the primary must be held in May of the same year. That proposed election code contains the 23-month qualification also. Thus this appeal involves a constitutional question of considerable moment to the Illinois legislature as it considers the proposed revised election code which is the product of nearly seven years of effort and study of a commitee composed of members of the legislature and other interested citizens, one of whom is Chairman of the Board of Election Commissioners of the City of Chicago.

Certainly there is a serious question as to whether the complaint here raised a sufficiently substantial federal question to warrant convocation of a three-judge court. Under the authority of 28 U.S.C. §2281, no three-judge court shall be convoked unless there is a showing that there is a substantial federal question and that issue can be considered even after the court has been convoked. *Swift and Company* v. *Wickham,* 382 U.S. 111, 86 S. Ct. 258 (1965). We respectfully submit that the applicable precedents in this Court demonstrate that the desire of Mrs. Pontikes to vote in the Democratic primary did not present a "substantial federal question." See *Lippitt* v. *Cipollone,* ..... U.S. ....., 92 S. Ct. 729 (1972); *State of Oregon* v. *Mitchell,* 400 U.S. 112, 91 S. Ct. 260 (1970); and *Rosario* v. *Rocke-*

feller, ... F. 2d ....., 40 L.W. 2691 (2nd Cir., 1972). Cf. *Williams* v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968).

Similarly, the applicable precedents of this Court with respect to desirable state and federal relationships so far as the federal judiciary are concerned, frequently referred to as the "abstention" doctrine, would have appeared to have required the three-judge court to withhold its hand. See *Lake Carriers' Association, et al.* v. *Ralph A. MacMullan*, ... U.S ....., ... S. Ct. ....., 40 L.W. 4569, 4573 (1972); *Jackson* v. *Ogilvie*, 401 U.S. 904, 91 S. Ct. 642 (1971); and *Reetz* v. *Bozanich*, 397 U.S. 82, 90 S. Ct. 788 (1970).

We submit that the opinion of the majority of the three-judge court unwarrantedly interferes with the power of the State of Illinois to conduct its elections. See *State of Oregon* v. *Mitchell*, 400 U.S. 112, 91 S. Ct. 260 (1970). Indeed the power of the states to regulate primaries has long been recognized by this Court. See *Ray* v. *Blair*, 343 U.S. 214, 72 S. Ct. 654 (1952). We likewise submit that the opinion of the majority unwarrantedly interferes with the rights of political association of hundreds of thousands of persons.

Appellants cannot ignore the fact that this Court has already granted a petition for certiorari in *Rosario* v. *Rockefeller*, ... U.S. ...., ... S. Ct. ...., 40 L.W. 3579. The New York statute involved in that case and the Illinois statute involved in the instant case are substantially different. Each, however, involves a qualification prerequisite to participation in party primaries. In the *Rosario* case the Court of Appeals for the Second Circuit found a "compelling state interest" in preserving and protecting

the integrity of the political party system. So also did the dissenting judge in the instant case. We endorse their views. In any event the state's interest in the political party system demonstrates that this case now involves a substantial question.

The party system in the United States has evolved from the very beginnings of this country. As President Calvin Coolidge said in his inaugural address on March 4, 1925, in pertinent part:

> ". . . Since its very outset, it has been found necessary to conduct our Government by means of political parties. That system would not have survived from generation to generation if it had not been fundamentally sound and provided the best instrumentalities for the most complete expression of the popular will. It is not necessary to claim that it has always worked perfectly. It is enough to know that nothing better has been devised. No one would deny that there should be full and free expression and an opportunity for independence of action within the party. There is no salvation in a narrow and bigoted partisanship. But if there is to be responsible party government, the party label must be something more than a mere device for securing office. Unless those who are elected under the same party designation are willing to assume sufficient responsibility and exhibit sufficient loyalty and coherence, so that they can cooperate with each other in the support of the broad general principles, of the party platform, the election is merely a mockery, no decision is made at the polls, and there is no representation of the popular will. Common honesty and good faith with the people who support a party at the polls require that party, when it enters office, to assume the control of that portion of the Govern-

ment to which it has been elected. Any other course is bad faith and a violation of the party pledges." [Inaugural Addresses of the Presidents of the United States from George Washington 1789 to Richard Milhous Nixon 1969, 91st Congress, 1st Session, House Document 91-142 (1969)].

Continued maintenance of party stability is equally important today.

We submit that the constitutional standard for review of state primary elections is of major importance to the each of the several states. We respectfully submit, however, that the standards discussed in *Dunn* v. *Blumstein*, ... U.S. ....., 92 S. Ct. 995 (1972), have no application here. The instant case is not a simple case of interference with, or denial of, the right of an individual to participate in the political process. In the instant case, the state has attempted to balance the competing interests of millions of persons who seek to participate in the political process. As this Court has pointed out in *Jenness* v. *Fortson*, 403 U.S. 431, 442, 91 S. Ct. 1970 (1971), a state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.

By its regulation of party primaries, the Illinois legislature has attempted to do exactly that. Granted that the legislature may not impose restrictions or requirements based on race, economic affluence, or the popularity of one's political views. See *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 807, 89 S. Ct. 1404, 1407 (1969); and *Williams* v. *Rhodes*, 393 U.S. 23, 33, 89 S. Ct. 5, 11 (1968). The statute involved in the instant case has no such infirmity. Indeed, as consideration of the whole of the Illinois system of regulation of conduct of primary

elections demonstrates, the Illinois legislature has endeavored to bolster and support the party system while protecting at the same time the right to organize new parties or for candidates to present themselves as independents. §7-43(d) is an integral part of that primary regulatory system. Orderly consideration of competing constitutional rights would appear to dictate that such a statute be tested against the familiar standard of reasonableness, rather than the standard of "compelling state interest" which has been applied to statutes which do no more than limit the rights of individuals to vote. See *McDonald* v. *The Board of Election Commissioners*, supra.

In any event, the proper standard to be applied to review of state primary regulations is itself a matter of substantial importance not only to the states directly involved, i.e., Illinois and New York at the moment, but also to the political framework of the nation.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIET G. PONTIKES,
Plaintiff,
vs.
STANLEY T. KUSPER, JR., FRANCIS P. CANARY, and MARIE SUTHERS, as The Chicago Board of Election Commissioners,
Defendants.
No. 71 C 2363

DONNA KLAETSCH and PETER LOMBARDO,
Plaintiffs,
vs.
GRACE MARY STERN, County Clerk,
Defendant.
No. 71 C 2415

Before SWYGERT, Chief Circuit Judge, MAROVITZ and BAUER, District Judges.

SWYGERT, Chief Judge. This case consolidates two actions, each of which attacks the constitutionality of sections 7-43(a), (d), and 7-44 of Chapter 46, Ill. Rev. Stat. Sections 7-43(a) and 7-44 condition voting in any primary upon a public declaration of party affiliation. Section 7-44 prohibits voting in the primary of one party if the voter

has voted in the primary of another party within the preceding twenty-three months.[1] Plaintiffs seek declaratory and injunctive relief under 28 U.S.C. §§1343, 2281 and 42 U.S.C. §1983.

The parties bringing the action are qualified Chicago and Lake County voters (plaintiffs Pontikes and Lombardo, respectively) who had voted in one party's primary in February 1971 and who now seek to vote in a different party's primary in March 1972, and a Lake County voter (plaintiff Klaetsch) who, though eligible to vote in any primary, challenges the restrictions that will attend her voting in March. Defendants are those officials responsible for the conduct of primary and general elections in each area, the Commissioners of the Chicago Board of Elections and the Clerk of Lake County.

The complaint in *Pontikes* v. *Kusper* was filed in district court in September 1971 and that in *Klaetsch* v. *Stern* in October 1971. A request for a three-judge court was sub-

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[1] Sections 7-43 and 7-44 provide:

§7-43. No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

(d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held. . . .

§7-44. Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges. . . . No person who refuses to state his party affiliation shall be allowed to vote at a primary.

sequently granted, and the two actions were consolidated. The plaintiffs principally charge that section 7-43(d), which outlines the so-called "twenty-three month" rule, is unconstitutional because it impinges upon the right to vote and the right of association. They claim further that sections 7-43(a) and 7-44, the sections requiring a declaration of party affiliation, should fall as violative of the right to privacy, the right to vote, the right of association, and the provisions of the Voting Rights Act of 1960, 42 U.S.C. §1971. They seek summary judgment based on these contentions. The defendants move to dismiss the complaint on the ground that no "case or controversy" has been presented, that no substantial federal question has been raised to vest jurisdiction in this court, and that even if jurisdiction were sustained, the federal courts should abstain from exercising it. We find no merit to these contentions and accordingly, we deny the defendants' motion. We grant the plaintiffs' motion for summary judgment only where section 7-43(d) is concerned. We find no basis for overturning sections 7-43(a) or 7-44.

I

The issues raised in the defendants' motion to dismiss have been considered and rejected by this court and others. Numerous cases have held that constitutional attacks on primary regulations by those immediately affected, prior to the primary date, do meet the requirements of a "case or controversy." *See Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Rosario* v. *Rockefeller,* No. 71-C-1573—*Eisner* v. *Rockefeller,* No. 71-C-1621 (E.D. N.Y., filed Feb. 10, 1972); *Bendinger* v. *Ogilvie,* No. 71-C-2037 (N.D. Ill., filed Nov. 16, 1971); *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971).

Moreover, this action raises several significant federal questions, principally the impact of the challenged statutes on the plaintiffs' right to vote and right of association. In *Bendinger* v. *Ogilvie, supra,* which involved a statute barring candidates from running in a primary who had voted in another party's primary within the preceding twenty-four months, this court did not contest the fact that primaries were subject to federal constitutional standards and considered only whether these standards were met. Simlarly, jurisdiction was properly found in two recent federal cases which dealt with primary election procedures comparable to those at issue here, *Gordon* v. *Executive Comm. of the Democratic Party of the City of Charleston,* No. 71-852 (D.S.C., filed Sept. 22, 1971), and *Rosario* v. *Rockefeller, supra.*

Finally, we see no reason to abstain from exercising our jurisdiction. There are no unsettled questions of state law at issue here which would require state court interpretation. The statutes involved are unambiguous. The only point in question is their conformity to the federal Constitution, a question we are mandated to resolve.

II

The plaintiffs' attack against section 7-43(d) is grounded upon both the right of association and the right to vote. We agree that the "twenty-three month rule" substantially burdens plaintiffs' right to vote in derogation of Article I, §2 of the Constitution. Those who have voted in the March 1971 primary of one party are now deprived of the right to vote in the March 1972 primary should they choose to switch parties at this time. Even voters eligible to vote in any primary this March are affected since they are forced to choose between their right to vote and their right

to freely affiliate within the twenty-three month period following the election. The defendants counter that the right to vote protected by the Constitution does not include the right to vote in a primary. They characterize primaries as the purely internal procedures of private organizations. We find the holding in *United States* v. *Classic*, 313 U.S. 299 (1941), dispositive:

> Where the state law has made the primary *an integral part of the procedure of choice*, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, §2. 313 U.S. at 318. (Emphasis added.)

See Williams v. *Rhodes, supra*; *Moore* v. *Ogilvie*, 394 U.S. 814 (1968); *Gray* v. *Sanders*, 372 U.S. 367 (1962); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Gordon* v. *Exec. Comm., supra*; *Rosario* v. *Rockefeller, supra*. Since in Illinois, primaries are subject to extensive state regulation, Ill. Rev. Stat., ch. 46, they fall squarely within the test of *Classic*.

In addition, we agree that the contested statute represents a significant incursion on the plaintiffs' rights of free association. It has the effect of attaching penalties to affiliation and disaffiliation since voters may not change parties during the twenty-three month period without being disenfranchised in the party primary of their choice.

Where a deprivation of the right to association or the right to vote is at stake, the statute will only be upheld if the state proves that it serves a "compelling" state interest. In *Williams*, the Court considered a challenge to several Ohio election laws which were claimed to make it "virtually impossible" for a new political party to be placed on

state ballots for the purpose of choosing electors pledged for particular presidential or vice-presidential candidates. The Court stated:

> In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." 393 U.S. at 31.

Kramer v. *Union Free School District*, 395 U.S. 621 (1969), used a "compelling state interest" standard where only a deprivation of the right to vote rather than of first amendment rights was charged. More recently this court in *Bendinger* v. *Ogilvie, supra,* applied the identical test. *See Rosario* v. *Rockefeller, supra.*

The interest which section 7-43(d) is claimed to protect is the state's interest in guarding against any distortions of the electoral process in general and in maintaining the integrity of the two-party system in particular. The statute serves these interests by preventing a practice known as "raiding." "Raiding" occurs when members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. But the statute sweeps too broadly, impeding both deceptive conduct and constitutionally protected activities. If section 7-43(d) were not in effect, massive party switching could occur either because of the well-planned raiding of one party's primary by members of another party, or because of massive dissatisfaction with the prevailing policies of an existing party. The state's interest upon which this statute is grounded could be characterized as "compelling" only

if the former alternative is more likely to occur than the latter, or if raiding constitutes a more important danger than the danger to constitutionally protected rights however often it occurs. There is no evidence to indicate that raiding is more likely to take place than "honest" switches of affiliation. Forty-four states do not impose post-election restraints on changing affiliation. This would indicate that raiding is not a serious threat to the multi-party system.

Moreover, we cannot say that the mere possibility of raiding is more important than the potential deprivation of first amendment and voting rights this statute effects. The state's interest in maintaining a multi-party system has been found to be "compelling" at the primary level only where constitutional claims were raised by *candidates* who were barred from running in one party's primary when they had voted in another party's primary within the previous two years, *Bendinger* v. *Ogilvie, supra,* or within the previous four years, *Lippitt* v. *Cipollone,* No. 71-5729 (U.S., filed Jan. 17, 1972), and by *candidates* who were required to sign oaths affirming their support for the presidential and vice-presidential candidates of the party to which they claimed allegiance, *Ray* v. *Blair,* 343 U.S. 214 (1952).

Where—as in the instant case—the state's interest is weighed against the constitutional claims of political party *members,* the outcome has been different. In *Williams* v. *Rhodes, supra,* burdens on the right to form a party capable of effectively competing with other parties could not be justified by the state's interest in promoting a multi-party system. In *Rosario* v. *Rockefeller, supra,* and *Gordon* v. *Exec. Comm., supra,* state laws which affected constitutional rights in the same fashion as the Illinois law also fell where the identical justifications were offered. Indeed,

dicta in *Bendinger* v. *Ogilvie, supra,* specifically distinguish between the associational and voting rights of members of political parties and the rights of candidates:

> The state's interest in limiting candidates from switching parties, as detailed above, is greater than its interest in limiting voters from switching parties. The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election.

These cases cannot be distinguished by characterizing the state's interest in section 7-43(d) in terms of the protection of the electoral process rather than the preservation of the two-party system. The difference is semantic. Distortion of the electoral process would here be occasioned by a distortion of the procedures of candidate selection, namely, the selection procedures of a two-party system.

We find none of the justifications offered by the state to be sufficiently compelling to outweigh the costs to constitutionally protected rights. The rights to free association and to the vote are at least as important today as they were at the time the Constitution was written. The pace of political change has greatly accelerated. A wide variety of important political events are likely to take place even during the two-year period in which voters must affiiliate with a single party or be disenfranchised. Moreover, primaries held during this period are likely to reflect a broad range of important issues. The Illinois statutes provide for elections

in each of the even numbered years for various state and county offices. These elections coincide with the elections for President, Vice-President, and members of Congress. Other primary elections are provided for, including special elections to fill certain vacancies, township elections, and city and village elections. These are conducted in the so-called "off years," the period between the regular primary and general election in the even numbered years. This scheduling, coupled with the twenty-three month rule of section 7-43(d), has the effect of precluding a voter from participating in a primary of one party in a township, city, or village election and another at the regular primary level. We find this result untenable. Whatever are the advantages of maintaining party stability for elections at any given level of government, they do not apply when national, state, and local contests are considered together. A voter ought not be required to hold himself bound to a single party on every level of government.

III

Plaintiffs claim that sections 7-43(a) and 7-44, which require a declaration of party affiliation prior to voting, burdens their rights to privacy, to freely associate, and to the vote, in addition to violating the Voting Rights Act of 1960, 42 U.S.C. §1971. We do not agree. The voter's choice of candidates in a single party's primary is not disclosed. The only public declaration he is called upon to make is to choose which party primary to participate in. Any imposition this places on the voter is minimal. Moreover, whatever burden is suffered is outweighed by the state's "compelling" interest in preventing election fraud. Membership in a political party may be distinguished from membership in any other organization because of the role of the

state in regulating and enforcing party selection procedures. *Cf. NAACP v. Alabama*, 357 U.S. 449 (1958). Sections 7-43(a) and 7-44 not only serve to enforce the twenty-three month rule, as the plaintiffs claim, but also to buttress the requirement that voters participate in only one party's primary at a time.

The motion of defendants to dismiss the complaint is denied, and the motion of plaintiffs for summary judgment is granted insofar as section 7-43(d) is concerned. Section 7-43(d) of the Illinois Revised Statutes, Chapter 46, is hereby declared to be violative of the Constitution of the United States and is null and void. Defendants, their officers, agents, servants, employees, and attorneys, and those persons who act in active concert or participation with them are permanently enjoined, without bond, from executing or enforcing section 7-43(d) of the Illinois Revised Statutes, Chapter 46.

Enter: Luther M. Swygert
United States Circuit Judge
William J. Bauer
United States District Judge

Dated: March 7, 1972

DISSENTING OPINION

MAROVITZ, *District Judge*. I dissent not because I disagree with the majority's characterization of the right to vote and freely associate or with the "compelling state interest" test that ought to be employed in determining whether or not an unconstitutional infringement of those rights has taken place but rather because having applied that test to the present situation, unlike the majority I have found no such infringement.

(I might note here that I fully concur in the jurisdictional findings of the majority; that a "case or controversy" does exist; that a substantial federal question has been raised; and that abstention would be improper in this case. The law is clear on these points and has been adequately documented by the majority. See Majority Opinion, *supra*, pp. 4-7.)

The crux of the majority opinion is based on the wholly valid proposition that any state infringement of the right to vote must be grounded in a "compelling interest" whose objective fully justifies tampering with rights so fundamental and hallowed as the right to vote and freedom of association. Indisputably the right to vote lies at the very heart of the democratic process and is a fundamental element in the principles by which this Nation is governed. Although the manifestation of this right has gone through vast political, social, demographic and geographic transformations over the years assuming the various shapes and forms suitable to the practicalities and exigencies of a particular era, its essential core stripped of historical and periodical gloss—the right of all citizens to choose freely without governmental interference—has always remained the same. It is the purity of this core that is protected from unwarranted and unjustified state intervention. Yet one need only look at the election code of any state in the Union today to realize that some sort of regulatory election procedure is not only justified and warranted but is moreover essential to preserve voting purity and to prevent electoral anarchy. What must be pinpointed, then, is that fine line between the permissible and the impermissible.

It is because I concur in the majority's general view of the "compelling interest" test and because I do not wish

my dissent to be misconstrued in any way as adulterating or altering that test or as permitting alleged violations of voting rights to be scrutinized with any less care than they are now being tested, that I find it necessary to briefly trace the development of the law in voting rights cases.

There are basically two criteria by which the constitutionality of an election statute can be judged, one objective and the other subjective. The objective test is simply the comparison of the questionable regulation with constitutional dictate and previous pronouncements of the Supreme Court. If the Supreme Court has specifically prohibited a certain practice there is no doubt that the state regulation which directly conflicts with that prohibition must fall. But the law has never been so precedentially precise as to cover all situations in all times and quite often a specific procedure upon which the Constitution and the Courts have not yet spoken is attacked. Thus, parallel with the development of specific prohibited categories of conduct and growing out of Supreme Court usage, there has evolved a subjective test that is used for those instances that do not fit into any preconceived constitutional slots. This subjective test, as used in election cases has matured from the "rational basis" to the "compelling state interest" test.

In the earlier years of our country the Congress and the Courts were concerned with the formative problem of expanding a basically limited suffrage to that of universal suffrage. The most blatant and obviously unconstitutional disenfranchisement was the quantitative exclusion of larger segments of the population such as black people and women. Both of these exclusions were cured by constitutional amendments, the latter occurring within our time, and quite understandably a state cannot now claim that it has

a "compelling interest" to exclude those groups. Disenfranchisements of this sort are easily discernible and fit into clear-cut constitutional categories.

In recent years cases dealing more with the qualitative rather than quantitative aspects of the vote have reached the Supreme Court. In these instances there was no outright denial of the right to vote but rather the question raised was whether the right of suffrage is denied by dilution or debasement of a vote cast by mal-apportionment. In *Reynolds* v. *Sims*, 377 U.S. 533 (1964) the apportionment of the Alabama Legislature's two houses was challenged on equal protection grounds.

See also *Baker* v. *Carr*, 369 U.S. 186; *Gray* v. *Sanders*, 372 U.S. 368; *Wesberry* v. *Sanders*, 376 U.S. 1; *U.S.* v. *Mosely*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299; *Ex parte Siebold*, 100 U.S. 371; *U.S.* v. *Saylor*, 322 U.S. 385; *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461.

In the last decade the courts have also been faced with the narrower more limited exclusions of smaller segments of the population. Often these lesser restrictions are of a very localized and regional nature unlike the nationwide exclusions of a century ago. At times these exclusions such as poll taxes or literacy tests come cloaked in the guise of a general regulation but in reality are racially motivated having a more pronounced effect on minority groups; other times the state is simply convinced that a certain regulation is desirable and permissible. See for example: *Carrington* v. *Rash*, 380 U.S. 89 (1965); State may not deny the opportunity to vote a bona fide resident because he is

a member of the armed forces. *Harper* v. *Virginia Board of Election Commissioners,* 383 U.S. 663 (1966): State may not impose a poll tax; *Kramer* v. *Union Free School District,* 395 U.S. 629 (1969): State may not require citizens to own or lease taxable realty in order to vote in a local election. See also *City of Phoenix* v. *Kalodziejski,* 399 U.S. 204 (1970); *Evans* v. *Cornman,* 398 U.S. 419 (1970): State cannot refuse to permit persons living in a federal enclave to vote; *Affeldt* v. *Whitcomb,* 319 F. Supp. 69 (Three Judge Court, N.D. Ind. 1970): State may not impose a one year residency requirement. See also *Hadnott* v. *Amos,* 320 F. Supp. 107 (Three Judge Court, M.D. Ala. 1970), *aff'd.* 401 U.S. 968 (1971) (one year residency requirement struck down) and *Keppel* v. *Donovan,* 326 F. Supp. 15 (Three Judge Court, D. Minn. 1970) (6 month requirement struck down).

Thus these specific practices have explicitly been outlawed by the Supreme Court and some lower Federal Courts. Yet as indicated earlier an implicit criteria has developed out of these cases to be used in those areas yet uncharted by the Supreme Court.

The District Court in New York in *Rosario, et al.* v. *Rockefeller, et al,* 71 C 1573 (Slip Op. February 10, 1972) spent a great deal of time in tracing the development of the subjective "compelling interest" test. In *Reynolds* v. *Sims, supra,* the Supreme Court said that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 377 U.S. at 561-62. A year later in *Carrington* v. *Rash,* 380 U.S. at 96, the Court stated that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State" and in 1966 in *Harper* v. *Virginia*

State Board of Elections, 383 U.S. 663 at 670, the Court indicated that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and confined."

The Court in *Rosario* went on to say:

"At the October Term of 1968, the Supreme Court continued to enlarge the divergence between the treatment to be accorded most state statutes when attacked as violating the Equal Protection Clause and the treatment to be accorded those statutes specifically affecting the right to vote. In *Williams* v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968), the Court was presented with a challenge to a set of Ohio statutes which made it extremely difficult for any party other than the Democratic or Republican Party to achieve the status of an established party and to have its name and its candidates placed on the ballot in the general election . . . The test applied by the Court, however, was not whether any merely rational basis could be imagined to justify the enactment of the statutes, but whether or not there was any *compelling* state interest to justify their existence . . .

The Court drew support for the use of this test from a case which had not involved the right to vote, but was solely concerned with First Amendment rights of association . . .

The Court concluded by saying that "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate," and ". . . the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold

is an invidious discrimination, in violation of the Equal Protection Clause." (393 U.S. at 31 and 34, 89 S. Ct. at 11 and 12).

The opinion in *Williams* v. *Rhodes, supra,* left one in some doubt as to whether the compelling state interest test would be applied to cases involving only voting rights and having no First Amendment overtones. Later in that same Term, however, the Court decided *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S. Ct. 1886 (1969), and did much in the *Kramer* opinion to clarify its view of the appropriate test to be used when statutes involving the right to vote are challenged on equal protection grounds.

In *Kramer,* the challenged statute restricted the vote in local school board elections to those otherwise qualified voters who were either parents of children attending schools within the local public school system or were owners or lessees of real property within the school district . . . The Court held that the compelling state interest test applied to the voting restrictions in issue, and, finding no such interest, voided the statute . . . The Court said:

> Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. *Carrington* v. *Rash,* 380 U.S. 89, 91, 85 S. Ct. 775, 777, 13 L. Ed. 2d 675 (1965); *Pope* v. *Williams,* 193 U.S. 621, 24 S. Ct. 573, 48 L. Ed. 817 (1904). Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. [Footnote omitted.] Therefore, if a

> challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (395 U.S. at 625-27, 89 S. Ct. 1888-90). [Emphasis in original.]

It is evident from the Court's opinion in *Kramer* that once a state has imposed basic voting requirements of citizenship, age, and residency, all further requirements (which by their nature must be viewed as restrictions) must of necessity be supported by a compelling state interest. This is effect places the burden of proof on the state, the reverse of the situation where the rational basis test is applied. The basic requirements of citizenship, age and residency, are to be tested, when they are challenged, by the traditional, "rational relation" test, used in garden-variety equal protection cases."

We therefore have before us a clearly defined subjective test to apply in our case given the absence of any specific Supreme Court pronouncement on the constitutionality of a 23-month rule. What must be determined is whether the State of Illinois has carried the burden in proving that it has not merely a rational basis for prohibiting voting in a primary of one party by a citizen who has voted within 23 months in the primary of another party but that it has a "compelling interest". What must also be kept in mind is that voting rights are not absolute and that there is a degree of constitutional infringement short of invidiousness that is permissible as long as the infringement is compelled by a state interest and affects the rights of the voters as

little as practicable under the circumstances. This in fact was part of the rationale of Bendinger, *supra*, at p. 4:

> "Before a state can place any restrictions upon the freedom to associate freely and to vote, it must be shown that a compelling state interest justifies such regulation. *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Jackson* v. *Ogilvie, supra. Further it must be shown that the state statute in question is not only as fair as possible but also that it infringes upon the First Amendment rights of those affected as little as practicable under the circumstances. Williams* v. *Rhodes, supra* at 32, 33; *Briscoe* v. *Kusper*, 435 F. 2d 1046 (7th Cir. 1970); *Jackson* v. *Ogilvie, supra.*" [Emphasis added]

The compelling interest asserted by the State is the prevention of inter-party "raiding" that would result from open primaries. Raiding occurs where members of one party vote in the primary of the opposition party in the hopes of electing a weak candidate or a "straw man" who could easily be defeated by the candidate of their true party in the general election. This might happen where the candidate of their true party is running unopposed in the primary and their votes are not needed; where a certain candidate in their party is far stronger than all challengers making their votes unnecessary and better utilized in the primary of the other party; or where members of one party in a certain district far outnumber the members of the opposition party and a great portion of the votes are expendable and can be allocated to set up a "straw man".

That such "raiding" can occur has been recognized by several Courts. In *Bendinger* v. *Ogilvie*, 71 C 2037 (N.D. Ill.) a Three Judge Court dealt with the Illinois statutory

requirement that in order to be an eligible candidate in a political party primary a person cannot have "requested a primary ballot of any other party at a primary election held within two years of the date on which the petition must be filed." Ill. Rev. Stat., Ch. 46, Section 8-8. The Court found the statute constitutional and said:

> "In addition to the policy of limiting the elective process to manageable and realistic proportions, there are even more serious and compelling reasons underlying this legislation. The most important of these is the prevention of the subversion of the entire elective process. The keystone of our democracy is the party system of politics. Before any general election, each party must go through its manpower resources in order to find a candidate who not only represents a consensus of the opinions of the members of his own party, but will be appealing to a majority of the entire voting population as well. If there were no "24 month rule", then this system could be thrown into total chaos. For instance, suppose Party A had a strong candidate for a certain post and it was clear that he would receive his party's nomination with votes to spare. Without the deterrent effect of the "24 month rule" it would be a relatively simple matter for Party A to have one or more of its party regulars run in Party B's primary in the hope that one would win the Party B primary and then put up little or no opposition to the Party A candidate in the ensuing general election. The resulting confusion and subversion of the elective process is obvious, and, without the "24 month rule", could not be controlled.
>
> There is another obvious reason which is clearly compelling and which underlies this legislation. It, too, is grounded in the protection of the elective pro-

cess. That is the question of protecting the party system as we know it. Without rules like the "24 month rule", party swapping and changing might conceivably become so prevalent that the average political party could no longer function properly. With the resulting disruption of party unity and discipline, a political party would be unable to decide who to support because the person whom they did or did not support today could be on the other side of the aisle tomorrow. Thus, it is obvious that the "24 month rule" protects the elective process from subversion from many sides and thereby serves to promote the most compelling of state interests."

The Court stopped short of applying this same compelling interest to voter rather than candidate cases and in fact indicated that the case might be different in the voter situation. *Bendinger,* however, was a candidate case and the Court had no real opportunity to adequately consider the "raiding" implications in voter cases. This Court on the other hand has had ample opportunity to consider all the evidence and to hear oral argument on this precise issue and I find that the State's prevention of "raiding" is as compelling an interest in voter cases as it is in candidate cases and that the State has met all of the requirements of the "compelling interest" test as set out above. (See also *Gundersᵒn* v. *Ghent,* et al., 69 C 43 (W.D. Ill. Slip. Op. February 2, 1970) which also upheld the statute regarding candidates on the grounds that "it reflects a State policy to foster and lend stability to party structure and political organization".)

In *Lippitt* v. *Cipollone,* C 71-667 (N.D. Ohio Slip Opinion, November 5, 1971) the Court also considered a statute regulating candidacy based on party affiliation. The Court said:

"The compelling State interests the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent "raiding" of one party by members of another party and to preclude candidates from ". . . altering their political party affiliations for opportunistic reasons.' *State ex rel. Bible* v. *Board of Elections,* 22 O.S. 2d 57 (1970). Protection of party membership uniformly applied to all parties cannot be characterized as "invidious discrimination" as defined in *Williams.* The United States Supreme Court has recognized the need to "protect a party from intrusion by those with adverse political principles' to be a legitimate purpose for said legislature. *Ray* v. *Blair,* 343 U.S. 214 (1952).

The requirement of the challenged statutes insuring party integrity and party political affiliation, together with the exemptions enacted to aid emerging political parties, are simple, reasonable, and uniform procedures designed to accomplish the desired result."

The U.S. Supreme Court in *Lippitt* v. *Cipollone,* 71-5729 (Slip. Op. January 7, 1972) in affirming the lower Court decision without opinion implicitly conceded the possibility of raiding and recognized its prevention as being a valid State interest. Preventing raiding is a valid compelling interest of the State and is as applicable, I believe, in voter cases as it is in candidate cases.

Juxtaposing this compelling interest of the State against the temporary deprivation of the plaintiffs' right to vote in this particular primary and considering the fact plaintiffs' are not deprived of their right to vote since they are perfectly free to vote in the primary of the party for which they voted in the February 1971 primary, I find no basis for overturning these statutes.

While the majority finds that "[t]here is no evidence to indicate that raiding is more likely to take place than 'honest' switches of affiliation" and "that raiding is not a serious threat to the multi-party system" (Majority Opinion, p. 8) I am compelled by the evidence and Illinois political circumstance to believe that such a threat is a very real and imminent one absent the statute in question and not merely one in the realm of the hypothetical or speculative. Thus my application of the compelling interest test to the present situation produces a different result than that of the majority based on the single, critical factor of the substantiality and probability of inter-party raiding.

We might note here that the result in *Rosario, supra* was the invalidation of a procedure that was also designed to prevent raiding. In that case however the "enrollment box" procedure failed to meet the "compelling interest" test because it was not the least drastic measure available to accomplish the objective sought and it was not proven that the system was necessary for its accomplishment. The Court did not however discount the possibility of raiding but determined that there was a less invidious method of preventing it. I, however, believe that the sweep of the 23-month rule is narrow enough to conform with the least invidious and compelling interest test.

Furthermore I do not believe that the contrary decision of *Gordon* v. *Executive Committee of the Democratic Party of Charleston,* 71 C 852 (D.S.C. Slip. Op. September 28, 1971) forecloses my opposite finding. The statute in that case also prevented a citizen from voting in the primary of another party and the Court invalidated it on the grounds that it was arbitrary and was not justified by a compelling State interest. What must be understood is that the "compelling interest" test is of an acutely subjective nature and

given the fact that political climates are as variable as geographic climates a State interest that might be less than compelling to a Judicial panel in one locale may take on compelling proportions to a panel in a different district.

I need not elaborate on the constitutionality of the Section 7-43(a) and Section 7-44 regarding the declaration of party affiliation since defendants themselves admit that it is the means by which the 23-month restriction is enforced. Having found that the 23-month rule is constitutional we likewise find that the same compelling State interest of "raiding" justifies the declaration of party affiliation and that it does not violate the First and Fourteenth Amendments, or the Voting Rights Acts. In addition the majority, which has found the twenty-three month rule unconstitutional has nevertheless upheld the declaration of party affiliation portion of the statute on the grounds that the infringement on the voter is minimal and that "whatever burden is suffered is outweighed by the state's 'compelling' interest in preventing election fraud," and that furthermore it is also necessary "to buttress the requirement that voters participate in only one party's primary at a time". (See Majority Opinion at pp. 11-12.) Thus even if we were not to consider raiding a threat we would nevertheless be bound to find the declaration portion of the statute constitutional based on the majority's reasons.

To summarize, then, in applying the current compelling interest test as designed for voting rights cases I have found that both the 23-month rule and the declaration of party affiliation is fully justified by the interest of the State in preventing the inter-party raiding that would result absent these restrictions; that the infringement of the plaintiffs' rights is minimal given its temporary nature

and the existence of alternate electoral avenues; and that these are the least drastic measures available.

In finding so I need not base my decision solely on the grounds that the preservation of party integrity and the multi-party system is a proper state interest as *Bendinger*, *Gundersᵒn* and *Lippitt* v. *Cippollone* do indeed indicate. The argument that this Court ought not be instrumental in preserving those artificial procedures and extra-constitutional encumberances, such as party politics, that have been engrafted wisely or unwisely by historical development upon the purity of the American electoral process might be a more valid one were we being asked to take the initiative in instituting such procedures where they did not before exist. Thus if political parties as such and their accompanying procedures were nonexistent it might be validly posited that it is beyond the province of this Court to lend assistance in their creation. This, however, is not a case where we are being asked by the State for a declaratory judgment or injunctive relief that would create or put into effect party system rules such as the 23-month or party affiliation regulations. Rather our task has been to analyse and weigh, with the prescribed constitutional criteria, an already existing law that the legislature in its considered judgment has determined to be the best method available for the preservation of that electoral purity that both sides in this case so earnestly desire. It is far beyond the role intended for this Court to adopt the posture of a microcosmic legislature that would design better methods of preserving electoral purity where an adequate statute that meets the compelling interest test has already been promulgated by the state legislature. In attempting to preserve that purity as embodied and manifested in the statutes under attack it would be remiss of this Court not to take judicial notice of the inescapable fact that parties

and party lines do indeed exist and that they are inseparable elements of the electoral scene. We would be equally remiss if we were not cognizant of the fact that party allegiances are powerful and can quite easily lead to nefarious inter-party raiding absent any restrictions. [See Dreiske, *GOP Primary Ploy*, Chicago Sun-Times, March 1, 1972, p. 40, which indicates that Republicans are being urged on a large scale to cross over into the Democratic Primary on March 21, 1972 since there are no real contests in the Republican Primary. The article indicates that an even greater crossover would take place were it not for the twenty-three month rule.] The adoption of such a position when reality so compels and the circumstances so dictate does not mean that I take a more jaundiced or more untrusting view of the voting public than does the majority but rather indicates that I believe the phenomenum of raiding to be an inescapable outgrowth of the competitiveness engendered by the multi-party system and that that competitiveness ought not go so far as to inject any impurities or fraud into the electoral process as it manifests itself on general election day. My determination then, that the statute is not unconstitutional is as much motivated by my desire to preserve the multi-party system as it is to prevent the shambles that could conceivably result in the general elections, irrespective of party considerations, absent any prophylactic measure to prevent raiding.

I would therefore find Sections 7-43 and 7-44 constitutional and dismiss the Plaintiff's case. Being in the minority I must be contented with a vigorous dissent.

Enter: Abraham Lincoln Marovitz
Judge

Dated: March 7, 1972

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge
Honorable Abraham L. Marovitz

Date March 9, 1972

No. 71 C 2363—Harriet G. Pontikes vs. Stanley Kusper, et al.

No. 71 C 2415—Donna Klaetsch vs. Grace Mary Stern, County Clerk

For decision

The three judge court having taken these two cases under advisement has decided by a vote of two to one that Section 7-43(d) of the Illinois Election Law which prohibits voting in a party primary by one who has voted in the primary of another party within twenty three months is unconstitutional. Chief Judge Swygert and District Judge Bauer for the majority have found that the twenty-three month rule infringes on the right to vote and the right to freely associate and that the State has failed to prove that it has a compelling interest in maintaining this statute.

Judge Marovitz dissents from the holding that the twenty-three month rule is unconstitutional and would uphold the statute on the grounds that the State does have a compelling interest in preventing inter-part raid-

ing and the crossing of party lines that would result in the absence of such a rule.

All three judges concur in the finding that the declaration of party affiliation as it appears in §7-43(a) and §7-44 *is constitutional* because its effect on voters is minimal and it is justified by the State's compelling interest to prevent voter fraud. Judge Marovitz holds in addition that it is necessary to effectuate the twenty-three month rule which he would uphold.

Holding: ***The twenty-three month rule, § 7-43(d) is ruled unconstitutional and the declaration of party affiliation rule § 7-43(a) and § 7-44 are held constitutional.*** (Draft)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIET G. PONTIKES,
Plaintiff,
vs.
STANLEY T. KUSPER, JR., FRANCIS P. CANARY, and MARIE SUTHERS, as The Chicago Board of Election Commissioners,
Defendants.
No. 71 C 2363

DONNA KLAETSCH and PETER LOMBARDO,
Plaintiffs,
vs.
GRACE MARY STERN, County Clerk,
Defendant.
No. 71 C 2415

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Stanley T. Kusper, Jr., Francis P. Canary and Marie H. Suthers, as the Chicago Board of Election Commissioners, some of the defendants in the above cause, hereby appeal to the Supreme Court of the United States from the final judgment declaring unconstitutional and enjoining the enforcement of Ch. 46, §7-43(d), Ill. Rev. Stats. entered

on March 9, 1972. This appeal is taken pursuant to 28 U.S.C. §1253.

/s/ Aldus S. Mitchell
William R. Ming, Jr.
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Dated: April 17, 1972

PROOF OF SERVICE

I certify that I served the attached Notice of Appeal to the Supreme Court of the United States on:

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by mailing a copy to each one in a properly addressed envelope with ordinary first class postage fully prepaid and depositing it in a United States Postoffice facility at Monroe and Dearborn Streets in Chicago, Illinois, on April 17, 1972, before 5:00 P.M.

/s/ Aldus S. Mitchell

E COPY

Supreme Court, U.S.
FILED
OCT 6 1972
MICHAEL RODAK, JR., CLERK

No. 71-1631

In the

Supreme Court of the United States

HARRIET G. PONTIKES,

Plaintiff-Appellee,

vs.

STANLEY KUSPER, FRANCIS P. CANARY and MARIE SUTHERS, AS THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellants.

DONNA KLAETSCH and PETER LOMBARDO,

Plaintiffs-Appellees,

vs.

GRACE MARY STERN, COUNTY CLERK,

Defendant-Appellant.

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1631

HARRIET G. PONTIKES,

Plaintiff-Appellee,

vs.

STANLEY KUSPER, FRANCIS P. CANARY and MARIE SUTHERS, AS THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellants.

DONNA KLAETSCH and PETER LOMBARDO,

Plaintiffs-Appellees,

vs.

GRACE MARY STERN, COUNTY CLERK,

Defendant-Appellant.

MOTION TO AFFIRM

Now comes the Plaintiff-Appellee, by and through her attorney, Ray Jeffrey Cohen, and in response to the jurisdictional statement heretofore filed states as follows:

1. That the Court should affirm the decision of the special three judge panel heretofore entered since the issues are so clear cut and other decisions throughout the country

based on similar statutes are consistent with that ruling of the three judge panel in striking the "23 month rule" which ruled that the state had no substantial interest which would be required to restrict the change of party affiliation for the purposes of primary voting by a voter. This is consistent with the decision in a South Carolina "calendar year" statute. *Gordon* v. *Executive Committee of the Democratic Party of the City of Charleston* (No. 71-852 D. S.C. 9/22/71); *Yale* v. *Kervin* (D.C. R.I. July 26, 1972, #4883).

2. The decision of this Court and other Circuit Courts with respect to residency requirement cases have consistently held that the voters' right to mobility is superior to the interest of the State in opposing restrictions upon who may vote. *Hadnott* v. *Amos*, 401 U.S. 968 (1971); *Keppel* v. *Donovan*, 326 Fed. Sup. 15.

3. Although we agree that the questions raised herein are of a substantial nature it is the contention of the plaintiff that these matters have been adequately answered by the Court and by other residency requirement cases above cited.

Respectfully submitted,

.....

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FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

VS.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court Of The Northern District Of Illinois

BRIEF OF APPELLANTS

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In The

Supreme Court of the United States

October Term, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court Of The Northern District Of Illinois

BRIEF OF APPELLANTS

OPINION.

The opinion of the three-judge court of the United States District Court for the Northern District of Illinois, Eastern Division, in *Harriet G. Pontikes* v. *Stanley T. Kusper, Jr. et al.*, is reported at 345 F. Supp. 1104 (1972) (App. 40).

JURISDICTION OF THIS COURT.

The judgment of the district court was entered on March 9, 1972 (App. 65). Notice of Appeal was filed on April 17, 1972. (Jurisdictional Statement App. 28a).

The Jurisdictional Statement was filed on June 16, 1972. On April 2, 1973, probable jurisdiction was noted, ... U.S. ....., 93 S. Ct. 1540. The jurisdiction of this Court rests on 28 U.S.C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review judgment on direct appeal from a decision of a three-judge court in this case: *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969); and *Anderson* v. *Martin*, 375 U.S. 399, 84 S. Ct. 454 (1964).

STATUTE INVOLVED.

Ch. 46, Ill. Rev. Stat. (1971), §7-43 (Vol. 2, p. 107) provides:

Qualifications of Voters—Regulations Applicable to Primary Elections—Registration Required.

§ 7-43. Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years, shall be entitled to vote at such primary.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town polictical party under the provisions of Section 7-2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held.

(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered

as provided by Article 6 of this Act shall be entitled to vote at such primary.

(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Article 4, 5 or 6 of this Act, when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held. [Amended by Public Act 77-1653, effective September 27, 1971.]

QUESTIONS PRESENTED FOR REVIEW.

1. Did the district court err in deciding a hypothetical case not before the court?

2. Did the district court have jurisdiction of the claims made in plaintiff's complaint?

3. Did the district court err in convoking a three-judge court since the complaint before it involved a purely local matter and, therefore, was not within the ambit of 28 U.S.C. 2281?

4. Should the district court have abstained from determining the constitutionality of §7-43(d) where the statute had not been interpreted by the state court, and where an interpretation could render unnecessary a decision on the constitutionality of the statute?

5. Is §7-43(d) unconstitutional?

STATEMENT OF THE CASE.

On September 28, 1971, plaintiff, Harriet G. Pontikes, filed a complaint in the District Court for the Northern District of Illinois, seeking to enjoin defendants, as members of the Chicago Board of Election Commissioners from enforcing as to her, in precinct 36 of the 50th Ward of the City of Chicago, certain provisions of the Illinois Election Code prescribing qualifications for voters at Illinois primary elections. Plaintiff specifically charged that §7-43(d) which prohibits changing political parties within twenty-three months was unconstitutional. She alleged that she had voted in the primary of the Republican party in the primary held on February 23, 1971, which obviously was less than "twenty-three calendar months" prior to the primary scheduled for March 21, 1972, and asked that defendants be restrained from enforcing that statutory provision to bar her from voting in the Democratic primary scheduled to be held on March 21, 1972. (App. 2-6)

Plaintiff sued solely on her own behalf and did not claim she represented a class or that there was any class situated as she (App. 5). The district court made no finding pursuant to Fed. Rules Civ. Proc. Rule 23, 28 U.S.C. Plaintiff did not state any facts to show that she was being treated in any manner different from others or that her rights to due process of law were violated. The complaint alleged jurisdiction in the district court pursuant to "Title 28, Section 1983, Title 42, § 1971(b)," Article I, Article II and Amendments I, XIV and XVI to the United States Constitution (App. 2).

The primary in which plaintiff alleged she participated on February 23, 1971 was a municipal primary involving only nominations for the offices of mayor, city clerk and city treasurer of the City of Chicago. The primary scheduled to be held on March 21, 1972, in contrast, was a primary of the kind generally held in Illinois prior to a general election and included nominations for governor, United States senator, congressmen in each Illinois congressional district, county officers in Cook County, members of both houses of the state legislature, and elections of delegates and alternates to the national nominating conventions of both parties, as well as election of other political party functionaries including State Central Committeemen and ward committeemen of the City of Chicago (App. 47-48).

Under the provisions of the Election Code of Illinois, such elections are conducted by defendants as the Board of Election Commissioners of the City of Chicago, (hereinafter sometimes referred to as the Board) which at the time of the filing of this case had jurisdiction throughout the City of Chicago and in four adjacent suburban towns, to wit, Berwyn, Cicero, Lyons and Stickney.[1]

The cause was initially assigned to Judge Abraham Lincoln Marovitz. On motion of plaintiff and over the objection of the defendants who contended that the cause did not raise a substantial federal question to warrant it, a three-judge district court was convoked (App. 6-16). Defendants filed an answer denying the material allegations of the complaint (App. 23-29). In conjunction with a similar action filed in the same district court against the Coun-

(1) At this time the towns of Cicero and Stickney are no longer under the jurisdiction of the Board.

ty Clerk of Lake County, Illinois, the county adjoining Cook County on the north,[2] the three-judge court considered plaintiff's motion for summary judgment (App. 16-22, 29-40).

The plaintiff also complained that §7-43(a) which provides in pertinent part:

> "No person shall be entitled to vote at primary: (a) unless he declares his party affiliation as required by this Article: . . ."

and §7-44 which provides in pertinent part:

> "Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges. . . . No person who refuses to state his party affiliation shall be allowed to vote at a primary."

were unconstitutional. The constitutionality of those provisions were upheld by a unanimous court.

The court, with Judge Marovitz dissenting, concluded that § 7-43(d) was unconstitutional and enjoined defendants from enforcing its provisions (App. 40-65).

The opinion of the three-judge court was not limited to the prayer of the complaint which involved only the plaintiff, Harriet Pontikes (App. 5, 49). As a result, in the City of Chicago and the suburban towns under the jurisdiction of the Board, the provisions of § 7-43(d) were not enforced in the primary held on March 21, 1972.

Appeal from this decision of the district court was timely filed and probable jurisdiction noted by this Court.

---

[2] No appeal was taken by the County Clerk from the decision of the three judge court in *Donna Klaetsch & Peter Lombardo* v. *Grace Mary Stern County Clerk*, No. 71 C 2415. According to the docket entries these cases were not consolidated but were argued on the same day.

SUMMARY OF ARGUMENT.

A three-judge district court, ignoring the substantial body of jurisprudence relating to pleading jurisdiction, a cause of action, a claim for which relief may be granted in the federal court, standing and the requirement of a case or controversy under Article III of the Constitution of the United States, constructed a hypothetical case and decided it. Apparently discerning, from the relief requested by the plaintiff, the allegations necessary to establish jurisdiction in the case, the district court supplied those missing allegations of fact and formal assertions of law to enable it to rule on the constitutionality of a state statute. Its action completely ignored the large body of decisions of this Court which instructs the courts and litigants that the federal judiciary should not decide constitutional issues unless there is no other means of disposing of a complaint and claims of the parties.

The failure of the district court to heed the admonitions which are inherent in the precedents caused the district court to make a decision which seems to create a substantial conflict between the State of Illinois and the federal judiciary. Comity, if nothing else, should have caused the district court to abstain from deciding the case, in the light of the long existence of the statutory provision involved, the administrative construction which had never been challenged, and the fact that the statute involved was capable of a construction so that the federal constitutional issue which the district court perceived would not exist.

After erroneously deciding the procedural issues and thus abusing its discretion in considering the case, the dis-

trict court compounded the error by applying an improper standard to its consideration of the constitutionality of Ill. Rev. Stats. 1971, Ch. 46, §7-43(d).

Without a single allegation of fact tending to show any invidious discrimination or denial of the right to vote, the district court applied the most stringent test that this Court has devised to consider the constitutionality of this state statute. Careful analysis of the decisions in which this strict test has been invoked discloses that there is no warrant for the application of the "compelling state interest" test to the statute in this case.

The "compelling state interest" test, though not applicable, was used by the district court to reach a decision which, apparently, it believed would serve some purpose. It cannot be that its purpose was to protect the right of any individual to participate in the primary in the State of Illinois since Illinois law already protects that right and in addition protects the integrity of political parties which this Court has held is a "compelling state interest". To suggest a particular purpose, however, would be to engage in speculation of the sort engaged in by the district court.

Speculation aside, it is clear that the district court has substituted its judgment for that of the legislature in spite of the provisions of Article I, Section 2 and Section 4 of the Constitution and the Tenth Amendment to the Constitution. The conduct of the district court is unwarranted unless the provisions of the Bill Of Rights and other provisions of the Constitution are to be set on several planes, some rights having a higher plane than others. It appears that the district court has determined that the "right to vote" is a right at the very highest plane, to be protected

without regard to the right of the state to carry on its affairs pursuant to the reservation of rights in the Tenth Amendment. Balancing of the rights protected, granted or reserved to the people and the several states is an absolute necessity to prevent the diminution of any of these rights. Unless the Constitution prohibits action by the state, the reservation of power in the Ninth and Tenth Amendments leave to the people and the political process the carrying on of the affairs of the people through the state. The decision of the district court is a perversion of the Constitution of the United States and must not be allowed to stand.

ARGUMENT.

I.

THE DISTRICT COURT DECIDED A HYPOTHETICAL CASE WHICH WAS NOT BEFORE IT.

The opinion of the three-judge court makes certain implicit findings of fact and conclusions of law which are not supported by any allegations in the plaintiff's complaint. This is a significant and fundamental error in the district court's treatment of the case. The court decided the case on plaintiff's motion for summary judgment on assumed facts. It was not supported by any affidavits and at no time was any evidence presented. A comparison of the pleadings with the court's opinion demonstrates that the district court in its zeal to reach issues it wished to decide constructed a hypothetical case to support its jurisdiction and to facilitate its decision of those issues, which were not properly before it.

The court stated that plaintiff Pontikes sought declaratory and injunctive relief under 28 U.S.C. §§ 1343, 2281 and 42 U.S.C. § 1983 (App. 40-41), despite the fact that her complaint did not include any reference to 28 U.S.C. § 1343 or 42 U.S.C. § 1983. Perhaps the court provided this statutory basis for jurisdiction with regard to some of these sections on the principle of a "liberal" reading of the complaint. Liberal construction of pleadings is justified where the pleading has been prepared by lay people. See: *Wallach* v. *City of Pagedale, Missouri*, 359 F. 2d 57 (8th Cir. 1966). This justification, however, does not apply in this case where the plaintiff is represented

by counsel duly admitted to practice in the district court, and where there is no suggestion that that counsel is incompetent. Though the complaint and the court mentioned "declaratory relief" neither makes any reference to 28 U.S.C. § 2201. § 2201 provides a remedy which did not exist in the common law. We suggest that ordinary rules of construction require that where one seeks a remedy provided by statute that the pleading should formally assert that the statute is relied upon by the complainant. See Fed. Rules Civ. Proc. Rule 84 and Form 2, 28 U.S.C.

The court stated that the basis of plaintiff's claim was the denial of the right to vote and right of association, and then decided that these rights were denied. In deciding that the right of association was denied the court assumed plaintiff to be a part of a group of plaintiffs who wished to change parties. Plaintiff here made no claim though that she was a part of any group of people with a similar intent or that she was suing as a representative of any class. As discussed, *infra*, section II, such an "association" existing at the time of the filing of the complaint would be necessary to bring this suit within the cases concerning the "right of association."

This unwarranted treatment of plaintiff as a member of a group, without any evidence to demonstrate it or any allegation of it, also bears on the court's determination that it had jurisdiction of plaintiff's claim that she was denied her right to vote. As is argued, *infra*, section V, the claim that she was denied her right to vote is not warranted by any section of the Illinois Election Code.

Additionally, the entry of injunctive relief was not supported by allegations necessary to satisfy even the

elementary requisites for entry of such equitable relief. There is no allegation of any irreparable injury to plaintiff nor any evidence offered. See *Toomer* v. *Witsell*, 334 U.S. 385, 68 S.Ct. 1156 (1948).

The jurisdiction of the court to grant declaratory relief is not supported. Neither plaintiff's complaint nor the court's decision nod at the factual allegations necessary to support a request for declaratory judgment. In this instance, the case for declaratory judgment relief was not hypothetical, it was non-existent. The complaint fails to state facts to show the existence of a case or controversy. See *Aetna Life Insurance Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 57 S.Ct. 461 (1937). A thorough examination of this problem was made by this Court in *Poe* v. *Ullman*, 367 U.S. 497, 81 S.Ct. 1752 (1961). It is clear that a plaintiff seeking a declaratory judgment must be able to show that the statute is invalid and that the plaintiff is in immediate danger of sustaining injury as a result of its enforcement. This Court should not approve the use of the remedy of declaratory judgment to enable a plaintiff to have judicial consideration of the constitutionality of a state statute which she cannot demonstrate in fact deprives her of a right granted or protected by the Constitution of the United States. Advisory opinions have never been approved by this Court and we respectfully suggest that it would be inappropriate at this time to enter upon that course.

Ignoring all of these blatant deficiencies and the total lack of evidence, the court rushed to consider the constitutionality of § 7-43(d). It determined that the statute could only be justified by the showing of a "compelling state interest". The court then found that the

possibility of party raiding did not justify the statute, for party raiding was less likely to occur than other party switching. That this determination of fact was made in an evidentiary vacuum and is pure speculation, is supported by the statement of the majority of the district court in its opinion when it says "there is no evidence to indicate that raiding is more likely to take place than 'honest' switches of affiliation" (App. 45-46). It is significant that no opportunity was ever provided by the court for the reception of evidence on this fact question.

It is this construction of a hypothetical case which enabled the district court to reach the question of the constitutionality of § 7-43(d) in the case at bar.

II.

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO DECIDE THIS CASE.

Plaintiff failed to satisfy the fundamental requirement of stating a proper claim in the federal district court in this case. Rule 8(a) of the Federal Rules of Civil Procedure sets out the general rules of pleading claims for relief. Those requirements are (1) "a short plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short plain statement of the claim showing the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled . . . ." The plaintiff has not satisfied these requirements. Neither does the plaintiff make sufficient allegations to show that she has standing to sue.

It does not appear that this Court has specifically ruled on the question of what satisfies the requirements of a

short statement of the grounds on which the federal district court's jurisdiction depends. This requirement is usually satisfied by a formal assertion of the statutory basis on which the district court's jurisdiction is invoked and a formal assertion of the statutory or constitutional basis for the claim thereafter set out in the complaint. In adopting the Federal Rules of Civil Procedure, this Court provided in Rule 84 that the types of allegations set out in the forms in the appendix were sufficient under the Rules. Form 2 entitled *Allegation of Jurisdiction* appears to require that a formal assertion of the basis of federal jurisdiction, including the statute involved, be included. An examination of the complaint (App. 2-6) discloses that at best the plaintiff does not make the formal assertions that are necessary to show that there is jurisdiction in the United States District Court pursuant to the United States Code.

In any event, the defendants in their answer challenged plaintiff's jurisdictional assertions (App. 23). It is well settled that if the formal assertions of jurisdiction are controverted that the plaintiff has the burden of demonstrating that there is in fact jurisdiction in the United States District Court. See *Pan American Petro Corp.* v. *Superior Court of Delaware,* 366 U.S. 656, 81 S. Ct. 1303 (1961); *Gully* v. *First National Bank in Meridian,* 299 U.S. 109, 57 S. Ct. 96 (1936); *McNutt* v. *General Motors Acceptance Corporation Of Indiana, Inc.,* 298 U.S. 178, 56 S. Ct. 780 (1936). Plaintiff made no such showing. In spite of the traverse made by the defendants in this case to the jurisdictional assertion, the district court ignored the challenges to its jurisdiction and proceeded to hear the case without considering this basic deficiency

in plaintiff's pleadings. It is not the position of the defendants that the district court had no authority to consider the complaint, since a court always has the authority to determine whether or not its jurisdiction has been properly invoked. It is the position of the defendants, however, that the traverse of the formal assertions of jurisdiction were sufficient to put the court on notice that the defendants were of the view that the district court did not have jurisdiction of this cause.

Plaintiff's complaint also fails to satisfy the second requirement of Rule 8(a) because it does not contain a plain and concise statement of the claim showing the pleader is entitled to relief. The complaint is devoid of any statement of fact or reference to fact to support the conclusion of the plaintiff in paragraph 8 of Count I that "the plaintiff will be denied her constitutional right to vote on March 21, 1972, by Chapter 46, Section 7-43, Ill. Rev. Stat. (1971) infra." (App. 4). The complaint does not allege that the Illinois Election Code invidiously discriminates against the plaintiff. There is no claim of racial or ethnic discrimination. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S. Ct. 125 (1960); *Smith* v. *Allwright*, 321 U.S. 649, 64 S. Ct. 757 (1944); *Hadnott* v. *Amos*, 394 U.S. 358, 89 S. Ct. 1101 (1969). Nor does the plaintiff claim discrimination based upon geographical location. *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969); *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964). Nor has the plaintiff claimed an invidious classification based upon poverty. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966). Nor has the plaintiff claimed discrimination or classification based upon political beliefs or party affil-

iations. *Hadnott* v. *Amos*, supra; *Williams* v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968). It is thus clear that the complaint does not state a claim upon which relief can be granted under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States since there is no claim here of any invidious classification which is the gravamen of a denial of equal protection. See *Snowden* v. *Hughes*, 321 U.S. 1, 64 S. Ct. 397 (1944).

In addition a comparison of paragraph 4 of plaintiff's complaint and paragraph 7 of plaintiff's complaint (App. 2-3) make it clear that the gravamen of plaintiff's complaint is not that she will be denied the right to vote by the Illinois Election Code, but that she wishes to vote in a particular party primary and the Illinois Election Code does not provide for her participation in that primary (See App. 24-25). Article I, Section 2 of the Constitution of the United States leaves to the states the qualifications of electors, in the several states. Article I, Section 4 of the Constitution of the United States does not change the power reserved to the states except to provide that the Congress may, by law, make or alter regulations concerning the times, places and manner of holding elections for members of the Congress of the United States. This Court, as recently as *Oregon* v. *Mitchell*, 400 U.S. 112, 91 S. Ct. 260 (1970) recognized that the states have the power to regulate elections under the Tenth Amendment to the Constitution of the United States and Article I, Sections 2 and 4 of the Constitution subject to the limitations set out in Amendments Fifteen, Nineteen, Twenty-four and Twenty-six to the Constitution.

The fact that this Court in *U. S.* v. *Classic,* 313 U.S. 299, 61 S. Ct. 1031 (1941) and in *Smith* v. *Allwright,* 321 U.S. 649, 64 S. Ct. 757 (1944) determined that federal courts had jurisdiction to determine whether or not the states regulation of primary elections passed constitutional muster, did not determine that the federal courts had jurisdiction of every claim made concerning a state primary election. We respectfully suggest that the precedents now make clear the circumstances in which there is jurisdiction under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States for the federal courts to act in cases involving primary elections. One of the circumstances is where there is a claim of denial of equal protection because of invidious classification or discrimination. Plaintiff's complaint does not satisfy that requirement.

The plaintiff in her assertion of jurisdiction also mentioned the First Amendment to the Constitution of the United States. The district court, in its opinion, stated that the plaintiff charged that Ill. Rev. Stats. (1971), ch. 46, §7-43(d) is unconstitutional because it impinged on the plaintiff's right of association. We respectfully suggest that the district court improperly relied on the First Amendment right of association as a basis for its decision in this case. Apparently, the plaintiff and the district court misread the numerous cases decided by this Court on the subject of the state constitutional power to regulate voting and the Fourteenth Amendment right of association.

It appears that the Fourteenth Amendment right of association was first applied to voting cases in *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5 (1968). In the *Wil-*

liams case this Court dealt with an effort by a group of people supporting a candidate to secure a place on the ballot for that candidate in order to express a political point of view which was different from that of the established political parties. It appears that the plaintiffs in that case claimed a denial of equal protection and a denial of due process under the Fourteenth Amendment because they were not permitted to assemble and espouse their political tenets and were, therefore, denied the right to cast their votes effectively. It is significant, we submit, that the plaintiffs' rights in *Williams* were being protected as this Court had theretofore protected the rights of groups on the basis of a "right of association" in *N.A.A.C.P.* v. *Alabama ex rel Patterson,* 357 U.S. 449, 78 S. Ct. 1163 (1958), *Bates* v. *City of Little Rock,* 361 U.S. 516, 80 S. Ct. 412 (1960), *United Mine Workers of America* v. *Illinois State Bar Association,* 389 U.S. 217, 88 S. Ct. 353 (1967), *United Transportation Union* v. *State Bar of Michigan,* 401 U.S. 576, 91 S. Ct. 1076 (1971). In all of those cases this Court appears to have determined that the "right of association" was a right protected by the Constitution of the United States to groups who had come together for a reason pursuant to the due process clause of the Fourteenth Amendment.

In the case at bar, there is a lone individual seeking to invoke that right of association without first "associating" with any other person with an aim to participate in a particular political party primary. There does not appear to be any case which has determined that there is a federal right to participate in a particular party primary election or indeed to associate without the consent of others. The plaintiff in her complaint does not disclose how the state law involved here denies to

her the right to vote. The only right to vote that can exist at the primary is the right to participate in the nomination of candidates by the political parties and we respectfully suggest that that right exists in Illinois without regard to whether a party primary is held or whether the nomination is by other means. New political parties and so-called "independents" are also provided for by the Illinois Election Code. (Ill. Rev. Stats. (1971), ch. 46, §§10-1 et seq.) Plaintiff does not say that the Illinois statute denies her the right to participate in the nominating process of some political party or group. Indeed she cannot make such a statement considering the other provisions of the Illinois Election Code providing for her participation. We respectfully submit that *Smith* v. *Allwright*, supra, and its progeny does not grant more to any citizen as we hereafter demonstrate in Section V of this brief.

There is no allegation in plaintiff's complaint which would place the defendants on notice of the basis for the claim which they are called upon to meet. Thus, the district court's assertion that the plaintiff's claim is grounded upon the right of association and the right to vote is unwarranted by the most liberal standards being applied to plaintiff's complaint. This complaint has not had the benefit of being expanded by the presentation of facts in support of the claim and thus cannot satisfy the requirements of *McNutt* v. *General Motors Acceptance Corporation of Indiana, Inc., supra.*

The relevant standards concerning "standing" are not met by the plaintiff and considering Rule 11 of the Federal Rules of Civil Procedure and the Illinois Election Code, the plaintiff cannot make the statement that she

is denied the right to participate in the nominating procedure in Illinois.

Plaintiff has failed to allege facts to show she has standing to pursue the claims she made because she has not shown that she suffers in any way differently than others by the application of the statute. It is not enough that a party suing may allegedly suffer with the public generally. The leading case on this subject is *Commonwealth of Massachusetts* v. *Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601 (1923). In that case this Court pointed out:

> The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

This doctrine was reaffirmed in *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-424, 89 S.Ct. 1843, 1848-1850 (1969). Plaintiff makes no allegation of how Ill. Rev. Stats. (1971) Ch. 46, § 7-43(d) affects her in some way different from any other person and does not claim that she is a member of any class. Rule 23 F.R.C.P. (App. 2-6).

It is clear that the plaintiff's complaint does not state a claim upon which relief may be granted either from the standpoint of the due process clause or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and that the plaintiff is without standing to maintain this action. The district court properly determined that plaintiff's claim under 42 U.S.C. § 1971 was not sufficient to warrant relief being granted (App. 48). This Court should decide that Count I of plaintiff's complaint likewise is inadequate because a claim for relief within the jurisdiction of the district court was not stated.

III.

THIS MATTER WAS NOT PROPERLY BEFORE A THREE-JUDGE DISTRICT COURT.

Succinctly stated, the issue raised by plaintiff's challenge of the constitutionality of §7-43(d) in the context of the facts in this case, is whether her participation in the Republican Party Primary for the nomination of persons to run for municipal offices bars her from voting in the Democratic Party Primary in the 36th precinct of the 50th Ward of the City of Chicago in regard to the nomination of persons to run for county and statewide offices. This is not an issue of statewide concern, nor does the lawsuit raise a substantial federal question by challenging the conduct of primaries other than in the area within the jurisdiction of the Board (App. 2-6).

The questions to be answered in determining whether issues raised by a complaint are only of local concern and thus not within the jurisdiction of a three-judge court under 28 U.S.C. 2281, are:

(1) whether the state statute which is challenged is one of general application or whether it affects only a particular area: *Board of Regents of the University of Texas System* v. *New Left Education Project*, 404 U.S. 541, 92 S.Ct. 652, 654-655 (1972); *Ex parte Collins*, 277 U.S. 565, 561-569, 48 S.Ct. 585, 586 (1928); *Rorick* v. *Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 212-213, 59 S.Ct. 808, 810-811 (1939); *Moody* v. *Flowers*, 387 U.S. 97, 101-102, 104, 87 S.Ct. 1544, 1548, 1549 (1967); and

(2) whether the officer sought to be enjoined is a state officer performing a state function. *Spielman Motor*

Sales Co. v. *Dodge*, 295 U.S. 89, 55 S.Ct. 678 (1935); *Rorick* v. *Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 59 S.Ct. 808 (1939).

The question of whether or not these requirements are satisfied must be answered in the negative on the facts of this case. This Court in *Moody* v. *Flowers*, 387 U.S. 97, 101-102, 104, 87 S.Ct. 1544, 1548, 1549 (1967) stated:

> The officer sought to be enjoined must be a state officer; a three-judge court need not be convened where the action seeks to enjoin a local officer (*Ex parte Collins, supra; Rorick* v. *Board of Commissioners, supra*) unless he is functioning pursuant to a statewide policy and performing a state function. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322. Nor does the section come into operation where an action is brought against state officers performing matters of purely local concern. *Rorick* v. *Board of Commissioners, supra.* . . . In No. 624, the constitutional attack was directed to a state statute dealing with matters of local concern—the apportionment and districting for one county's governing board. The statute is not a statute of statewide application, but relates solely to the affairs of one county in the State. The fact that state officers were named as defendants cannot change the result.
>
> It is said that there is enough similarity between this law and the laws governing other Alabama counties as to give this case a statewide interest. It is said that 29 counties having a city of consequence located within their borders have the same "crazy quilt" of malapportionment to insure rural voters' control. It is said that 32 other counties provide for election of county board members at large but with a local residence requirement which insures rural control. It is said that six rural counties elect their

governing bodies on an at-large basis with no local residence requirement. We indicate no views on the merits. But we do suggest that even a variety of different devices, working perhaps to the same end, still leaves any one device local rather than statewide for purposes of the statutory three-judge court. . . . Since the "statute" in each of these cases is one of limited application, concerning only a particular county involved in the litigation, a three-judge court was improperly convened. Appeals should, therefore, have been taken to the respective Courts of Appeals, not to this Court. Since the time for perfecting those appeals may have passed, we vacate the judgments and remand the causes to the court which heard each case so that they may enter a fresh decree from which appellants may, if they wish, perfect timely appeals to the respective Court of Appeals. (citation omitted)

In the context of the facts in this case the issues raised are local. The sole defendants in the case are the Board and its members which had jurisdiction only over the City of Chicago and four suburbs. Ill. Rev. Stats. (1971) Ch. 46, 6-1 *et seq.* It was created by virtue of the vote of the citizens within its jurisdiction. Ill. Rev. Stats. (1971) Ch. 46, § 6-2.

The suit concerns the effect of only plaintiff's participation in the municipal primary in the City of Chicago where the two major political parties field candidates. Municipal primaries are not held throughout the state but only in certain areas, and even where they are held the major political parties do not always field candidates. Thus, § 7-43(d) only has the effect of which plaintiff complains in certain local areas in the state. This is the kind of situation involved in *Board of Regents of*

the University of Texas System v. *New Left Education Project, supra,* and *Rorick* v. *Board of Commissioners, supra.* The case at bar was indeed a local complaint.

Importantly, the plaintiff and the district court did not concern themselves with complying with the requirements of 28 U.S.C. § 2284(2). An examination of the docket entries and the record on file in this cause does not disclose that the attorney general and the governor of the State of Illinois were given any notification of the hearing in this case. We respectfully submit that this being a statutory action that the requirements of the statute must be met in order to vest jurisdiction in the statutory three-judge court. This failure to comply with the statute is yet another indication of the deficiencies in this entire case.

Of even more significance is the failure of the district judge, to whom this case was initially assigned, to properly determine that a substantial federal question had been raised by the pleadings in this cause sufficient to warrant the convoking of a three-judge court. The fact that this cause has been heard by such a court does not prevent this Court from considering whether the three-judge court had jurisdiction in the first instance. *Swift & Company* v. *Wickham,* 382 U.S. 111, 114, 86 S.Ct. 258, 260 (1965). An examination of the opinion of the district judge on the motion for a three-judge court (App. 11-16) disclosed that the district judge at that time, as the court in the decision of this case, was confused concerning the relevant standard for determining whether there was a substantial federal question present.

The court, in a bootstrap operation, relied primarily on a case which had been decided in that district court,

Caryl Bendinger, et al. v. *Richard Ogilvie,* 335 F. Supp. 572 (N.D. Ill. 1971). In that case a three-judge court applying the compelling state interest test had decided that a substantial federal question was involved in an attack on the durational party membership requirement for candidates. The court also relied on *Gordon* v. *Executive Committee of the Democratic Party of the City of Charleston,* 335 F. Supp. 166 (D.S.C. 1971); *Rosario* v. *Rockefeller,* No. 71C 1573 (E.D.N.Y. Feb. 10, 1972). Those cases are inappropriate authority for determining that there was a substantial federal question in this case. Generally, this Court has determined that a single plaintiff is without standing to attack the validity of a statute unless that litigant is harmed in a manner differently than other citizens are harmed by that statute. *Frothingham* v. *Mellon,* 262 U.S. 447, 43 S.Ct. 597 (1923), and *Jenkins* v. *McKeithen,* 395 U.S. 411, 89 S.Ct. 1843 (1969). Certainly this question of standing is determinative of the question of whether there is a substantial federal question raised by the pleadings. An examination of *Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691 (1962), discloses that this Court has required that a person seeking a remedy for injury done to important rights of a significant portion of the citizens of a community, demonstrate that he represents the interest and concerns of persons other than himself, has suffered a real injury and is not merely making the claim to protect a right possessed by every citizen to require that government be administered according to law. The single litigant seeking only to vindicate a right in a single precinct of the City of Chicago, a city of over 3,000 precincts, hardly meets that test.

If this Court will consider that plaintiff's complaint does not state how Ill. Rev. Stats. (1971) Ch. 46, § 7-43(d) deprives her of any right protected by the Constitution of the United States, it becomes clear that the district court supplied, probably without realizing it, facts which are necessary to state a cause of action. We respectfully submit that without a cause of action being stated, no substantial federal question arises. The memorandum opinion concerning the motion for a three-judge court is wholly devoid of any suggestion that any Fourteenth Amendment or Fifteenth Amendment right of this plaintiff was interfered with or denied.

We respectfully suggest that the requirements of *Ex parte Poresky*, 290 U.S. 30, 54 S.Ct. 3 (1933) and *Idlewild Bon Voyage Liquor Corporation* v. *Epstein*, 370 U.S. 713, 82 S.Ct. 1294 (1962) have not been met by the complaint in this cause and the district judge improperly requested the Chief Judge of the United States Court of Appeals for the Seventh Circuit to convoke a three-judge court. We respectfully suggest that in this case, as in *Moody* v. *Flowers, supra*, this Court should vacate the order convoking the three-judge court and the judgment and remand the cause to the court which heard the case so that it may enter a proper decree.

IV.

THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THE CONSTITUTIONALITY OF SECTION 7-43(d).

This was a proper case for the application of the doctrine of abstention by the district court. The statute which plaintiff challenges has not been interpreted by a

state court with respect to the factual circumstances raised by the plaintiff here. It is possible that the state court would interpret § 7-43(d) to prevent a federal constitutional question arising. Until the state court interprets the state statute the federal court should abstain from deciding the constitutional issue. *Reetz* v. *Bozanich*, 397 U.S. 82, 90 S.Ct. 788 (1970), *Lake Carriers' Association* v. *MacMullan*, 406 U.S. 498, 92 S.Ct. 1749 (1972).

The plaintiff in the case at bar has suggested that Ill. Rev. Stats. (1971) Ch. 46, § 7-43(d) prevents her from participating in the statewide Democratic Party primary because she had participated in the City of Chicago Municipal Republican Party primary less than twenty-three months previously. The Illinois Supreme Court had interpreted that statute previously but refused to determine whether participation in a municipal primary limits participation in a statewide primary because the party raising it did not have standing. In that case, *Faherty* v. *The Board of Election Commissioners of the City of Chicago*, 5 Ill. 2d 519, 126 N.E. 2d 235 (1955), the Supreme Court of Illinois held, as to the matters properly before it, that neither the Republican nor the Democratic Party was a political party "within the city . . . only", within the meaning of § 7-43(d) because both of those parties are statewide and countrywide political parties. Therefore, the court concluded that one who voted in a major party primary conducted on a statewide basis was barred from participating in a municipal primary of another party within the twenty-three month period.

Whether the Illinois court would construe § 7-43(d) as requiring the reverse, however, namely that voting in

a purely municipal primary within the twenty-three month period would bar voting in the primary of the other party, is not clear either from the decision in the *Faherty* case or the language of the statute. Accordingly, this is a proper case for the application of the doctrine of abstention. *Fornaris* v. *Ridge Tool Company,* 400 U.S. 41, 91 S.Ct. 156 (1970). Obviously if the statute had been construed so as not to bar plaintiff from voting in the March 21, 1972 Democratic Party primary, there would have been no federal question in this case, even by the erroneous standard applied by the district court.

The effect of the district court's decision that § 7-43(d) is unconstitutional was also inappropriate without the state courts first considering it. This section is an integral part of the complex election machinery which protects the integrity of political parties and insures the fair and equitable enforcement of the election laws in the registration and challenge of voters and the conduct of the election. In *Jackson* v. *Ogilvie,* 401 U.S. 904, 91 S.Ct. 642 (1971) this Court in applying the doctrine of abstention in a case involving the Illinois Election Code said:

> While these issues are by our federal standards 'justiciable', federal courts are usually less able than state courts to work their way through a maze of state electoral laws. If federal courts take the laboring oar in these so-called "emergency" cases involving local electoral laws, they must make quick decisions on local law issues that are often tangled with matters of local construction and administration.

The wisdom of abstention becomes clear when one considers the other sections of the Illinois Election Code affected by the decision of the district court.

Section 7-43(d) is an integral part of the election system in Illinois. The twenty-three month limitation which assists in preserving party integrity, facilitating identification of party members, and carries out the basic principle of party politics which is the mainstay of the election processes in this country. This limitation that a person cannot vote in a party primary if he has voted in another party's primary within twenty-three months is consistent with and part and parcel of the effective conduct of the Illinois election system. See the Appendix attached to this Brief.

Throughout the Election Code, there are requirements that persons participating in the election process be either from a political party, a qualified primary elector of a party, affiliated with a party, a qualified primary voter, or in the same political party as someone else. Often the standard to be used to identify these persons is not defined. Because of the requirement in § 7-43(d) that, to vote in a party primary thus showing party affiliation, a person must not have voted in the primary of another party within twenty-three months, the unchallenged administrative rule has been to use this as the standard of party affiliation when none has been provided by the statute. To declare § 7-43(d) unconstitutional is to cripple a system which, to work well, often depends on the participation of members of opposing parties.

From the outset party affiliation is required for deputy registrars, one from each of the political parties to register persons. No standard for their selection is provided (§ 6-50.2). Persons who sign nomination petitions of candidates who wish to run in a party primary, must show

they are qualified primary electors of that party. The standard there is that said elector has not voted in another party primary within two years (§ 7-10). The candidate must satisfy the same standard.

The conduct of the election, primary or general, by the judges of election depends on the adversary system created by having, out of the five judges of election, two of one party and three of the other party (§§ 7-26, 7-28, 14-1, 14-2, 14-3.1, 14-3.2, 14-4, 14-6). These judges are usually selected prior to election day and many are sworn in on election day. One judge of each party, to insure fairness, is required to be present to provide assistance to voters when needed (§ 17-14), and all the judges participate in the canvass of the vote (§ 17-18, also see §§ 17-18.1, 18-9). The purpose of having both major parties represented is to insure the honesty of the election by means of an adversary system. The system will not work if the election judge is not really affiliated with the party he represents and is actually in sympathy with the opposite party. Thus the check of the proposed judge's voting record using the standard in § 7-43(d) is an effective way of identifying the proposed election judge's actual party affiliation.

The voters who wish to vote in a particular party primary who are challenged as being ineligible are also measured by the § 7-43(d) standard which is part of the provisions of § 7-45 setting forth the contents of the challenged voter's affidavit which the elector must execute before he is allowed to vote.

The defendants, in carrying out the duty and responsibility of protecting the elections from fraud and

overreaching and protecting the integrity of political parties, have administratively construed the Illinois Election Code. They apply the party affiliation test set out in §7-43(d) to other provisions of the Code where the political party affiliation of the voter is necessary to protect the integrity of the political party, the nomination procedure and the election. This administrative construction of the Election Code has been necessary since the adoption of the Code in 1943 and there has been no suggestion that the administrative construction has not been consistent. It is well settled in Illinois that a long standing administrative interpretation of a statute is entitled to great weight when the statute is considered by a court. *Cook County* v. *Healy*, 222 Ill. 310 (1906), *Fried* v. *Danaher*, 46 Ill. 2d 469, 263 N.E. 2d 280 (1970). To the same effect are *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884 (1960) and *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137, 80 S.Ct. 1392 (1960). §7-43(d) is an integral part of the elaborate and complex Illinois election system. Interpretation of it as unconstitutional will have a profound effect on the balanced and equitable administration of the Illinois system. The final authority to interpret this state statute rests in the Supreme Court of Illinois. The district court should have restrained itself so as to avoid the waste of a tentative decision as to state law and the premature adjudication of a constitutional question. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941). The federal court should abstain and let the state court first take the laboring oar to interpret it.

V.

THE DISTRICT COURT ERRED IN DECLARING SECTION 7-43(d) UNCONSTITUTIONAL.

The district court's assertion that section 7-43(d) of the Illinois Electoral Code prevents participation in the electoral process (App. 43-47) is unwarranted. A plain reading of the statute shows that the only fair comment concerning the section is that it regulates the participation in a particular party's primary if an elector, who by past conduct within twenty-three months, has demonstated an allegiance to another political party. The Illinois courts in interpreting this section have not decided whether participation in a municipal primary of one party prohibits participation in the primary of another party on a statewide level. See *Faherty* v. *Board of Election Commissioners of Chicago*, 5 Ill. 2d 519, 126 N.E. 2d 235 (1955).

In order to place § 7-43(d) of the Illinois Election Code in proper prospective, it is necessary to consider other sections of the Election Code which provide for nomination of candidates for the general election by means other than a primary. Section 10-1 et sequitor provide for nomination in the general election by persons not members of a recognized political party. Sections 10-1 et sequitor also provide for the formation of new political parties. Taken all together it is clear that participation in the nominating process is available to any qualified elector in the State of Illinois without regard to race, geographical location, sex poverty or any other restriction.

This Court has never suggested that the "party system" interferes with any individual right protected by

the Constitution of the United States. What this Court has decided is that access to the primary or any other part of the election process may not be denied on irrational or invidious grounds such as color, military status, durational residence requirements or other grounds determined to be invidious. *Smith* v. *Allwright*, 321 U.S. 649, 64 S.Ct. 757 (1944), *Carrington* v. *Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965), *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972) and *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 26 S.Ct. 1079 (1966). None of those decisions either separately or in combination adds up to a condemnation of the "party system". Indeed, in *Williams* v. *Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968), this Court made it clear that the Constitution did not permit state statutes to stand which interfered with the formation of new political parties. As recently as *Rosario* v. *Rockefeller*, ... U.S. ....., 93 S. Ct. 1245 (1973) this Court announced that the protection of political parties was a legitimate state goal which justifiies some minimal interference with the desires of persons in New York to participate in party primaries without any restrictions. The district court's decision below effectively nullifies the attempts by the Illinois legislature to achieve that protection. This Court therefore must examine the standard used by the district court to hold section §7-43(d) unconstitutional.

The district court determined that the plaintiff's attack against § 7-43(d) was grounded upon the right of association and the right to vote and stated:

> Where a deprivation of the right to association or the right to vote is at stake, the statute will only be upheld if the state proves that it serves a 'compelling' state interest. (App. 44)

The "compelling state interest" standard has been approved by this Court in numerous situations, all involving inherently suspect classifications; for example: denial of the right to vote because of poverty, *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966); mandatory sterilization of particular classes of criminals, *Skinner* v. *State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110 (1942); curtailment of civil rights of a racial group, *Korematsu* v. *U.S.*, 323 U.S. 214, 65 S.Ct. 193 (1944); interference with freedom of religion, *Sherbert* v. *Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963); and interference with associational rights *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S.Ct. 328 (1963). As we point out in Section II of this brief, the plaintiff has not alleged any classification or alleged facts from which one might conclude that there is a classification made by the statute whether invidious or otherwise.

It appears that the "compelling state interest" test was really first applied to voting cases in *Williams* v. *Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968). In that case this Court was protecting the rights of a group of people who had come together to espouse a political point of view which they believed to be different from that of either of the major political parties. The Ohio statute made it extremely difficult, if not impossible, for that group to secure a place on the general election ballot for its candidate, thereby preventing them from casting a vote for a candidate who might represent them and their political views in the halls of government. In the case at bar, the plaintiff, a lone individual, is not attempting to join with others to place a candidate on the general election ballot who espouses a political point of view different from

those of the established political parties. She seeks to participate in the affairs of an established political party in the nominating process without complying with the state regulations which have been adopted by the legislature, regulating who may participate, the circumstances in which a person may participate and providing safeguards for established political parties. We submit that none of this denies the right to participate in the electoral process.

In *Rosario* v. *Rockefeller, supra,* this Court considered the question of whether or not only an enrolled member of a political party could vote in that political party's primary and determined that a regulation concerning participation in a particular political party's primary was in no sense invidious. In that regard, section 7-43(d) is not unlike section 186 involved in *Rosario.* Neither statute denied the electoral franchise. Similarly, section 186 in *Rosario* and section 7-43(d) in this case merely place time limitations on participation in a particular party's primaries. Section 7-43(d) does not prevent the plaintiff from voting in the 1972 primary but merely postpones her participation in the nominating process of the Democratic Party. See: Ill. Rev. Stats. Ch. 46, § 7-43(b)(c) and § 7-10.

We do not urge that there is any constitutional infirmity in the "compelling state interest" test. We only urge that there is no justification in the precedents for applying a "compelling state interest" test to section 7-43(d). Analysis of the statute and its effect, along with the balance of the Illinois Election Code, clearly shows that no due process right of the plaintiff is threatened and she has not been denied the right to vote or threat-

ened with a denial of the right to vote by the Illinois Election Code.

The decisions of this Court in *Williams* v. *Rhodes, supra,* and *Lippitt* v. *Cipollone,* 357 F. Supp. 1405 (N.D. Ohio, 1971) affirmed 404 U.S. 1032, 92 S. Ct. 729 (1972) clearly show that the preservation of the political parties is a "compelling state interest". Since *Merchants Exchange* v. *Missouri,* 248 U.S. 365, 39 S.Ct. 114 (1919), it has not been doubted that the state had the power to enact such legislation as was necessary for the prevention of fraud, cheating, and imposition. We respectfully suggest that that power for the protection of commercial transactions cannot be more than the power the state has to protect the integrity of the election process. This Court has approved the protection of political parties in *Ray* v. *Blair,* 343 U.S. 214, 72 S.Ct. 654 (1952), *Williams* v. *Rhodes, supra, Lippitt* v. *Cipollone, supra, Rosario* v. *Rockefeller, supra,* and approved protecting the integrity of the election process in *Hadnott* v. *Amos,* 394 U.S. 358, 89 S.Ct. 1101 (1969).

The party system of the United States did not begin with the founding of the republic, but from the very beginnings of this country, the development of various political theories and tenets has been such that Calvin Coolidge in his inaugural address on March 4, 1925 said:

> . . . Since its very outset, it has been found necessary to conduct our Government by means of political parties. That system would not have survived from generation to generation if it had not been fundamentally sound and provided the best instrumentalities for the most complete expression of the popular will. It is not necessary to claim that it has always worked perfectly. It is enough to know that nothing

better has been devised. No one would deny that there should be full and free expression and an opportunity for independence of action within the party. There is no salvation in a narrow and bigoted partisanship. But if there is to be responsible party government, the party label must be something more than a mere device for securing office. Unless those who are elected under the same party designation are willing to assume sufficient responsibility and exhibit sufficient loyalty and coherence, so that they can cooperate with each other in the support of the broad general principles, of the party platform, the election is merely a mockery, no decision is made at the polls, and there is no representation of the popular will. Common honesty and good faith with the people who support a party at the polls require that the party, when it enters office, to assume the control of that portion of the Government to which it has been elected. Any other course is bad faith and a violation of the party pledges. [Inaugural Addresses of the Presidents of the United States from George Washington 1789 to Richard Milhous Nixon, 1969, 91st Congress, 1st Session, House Document 91-142 (1969)].

Thus it appears that the legislative, the executive and the judicial branches of government have recognized that political parties are a necessary and integral part of the government of this country and the carrying on of the election process. The opinion of the dissenting judge in the district court makes it eminently clear that once the "compelling state interest" exists to protect political parties and the integrity of the election system that the harm from which the political parties and the election system is being protected in this case is very real. Though the record in this case does not show it, it is quite pos-

ible that in the jurisdiction of the Chicago Board of Election Commissioners in 1972, the outcome of the elections might well have been determined by those persons switching from the Republican Party to the Democratic Party in an effort to cause the election of the Republican candidates. It appears that the plaintiff might well be one of those who believed that the best way to elect a Republican Party member was to cause an inept, unattractive person to be nominated by the Democratic Party. This possibility, recognized by the dissenting judge in the district court, might well now be realized.

The misapprehension of the district court of the proper standard to be applied in considering whether section 7-43(d) improperly interferes with a constitutional right of the plaintiff does not necessarily vitiate the decision of the district court. The district court in commenting on the constitutionality of Section 7-43(d) in its opinion apparently considered that the plaintiff in this case had a constitutionally protected right to participate in the Democratic Party primary in March, 1972, and appears to have relied on *U.S.* v. *Classic,* 313 U.S. 299, 61 S.Ct. 1031 (1941). We did not urge in the district court that there was no federal jurisdiction to consider infringement of the right to vote in primaries and we do not so urge here. We do suggest, however, that there is nothing in *U.S.* v. *Classic* to warrant any assumption that *Classic* announced a right to participate in the nominating primary of a particular political party. *Classic* established that the federal government had authority to protect the rights of people to participate in the election process. In *Classic* the question facing the court was whether or not a fraudulent count of the votes in a primary de-

prived electors of rights secured by the United States Constitution. *Smith* v. *Allwright, supra,* followed *Classic* and certainly since that time there has been no doubt in the mind of serious people of federal jurisdiction of the question of whether a state can constitutionally prohibit participation in some political party's primary. The court in considering Section 7-43(d) mistakenly attributes to Section 7-43(d) an effect, i.e. denial of participation in the primary, which the statute does not have. With that as a point of departure we respectfully suggest that the outcome was inevitable.

The long existing presumption of constitutional validity of the acts of the legislature has been totally ignored here. See *McGowan* v. *State of Maryland,* 366 U.S. 420, 81 S.Ct. 1101 (1961) and *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404 (1969). This presumption, we suggest, requires at minimum, facts sufficient to establish that a federal constitutional right has been interfered with by a state statute prior to that statute being held unconstitutional. This was not done in this case. In granting the plaintiff's motion for summary judgment (App. 49), the court did not require that the plaintiff demonstrate even by affidavit that facts existed which, if true, would warrant the court finding that a federally protected right had been denied. As we have heretofore demonstrated in Section II of our brief, the complaint was not sufficient to warrant relief being granted even if all of the facts alleged there were true.

Assuming, arguendo, that the complaint alleged facts which, if true, would show an interference with a federally protected right, the district court should have so

ruled and afforded to the defendants an opportunity to present facts which might tend to justify that impairment of the constitutional right by the state. This failure to do so appears to place the right to vote and the right of association on a plane higher than that of the other rights protected by the Constitution of the United States. In *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944) this Court, considering the First Amendment right of religious freedom, observed that it doubted that any of the great liberties protected by the First Amendment could be given a higher place than others. We respectfully suggest that the conduct of the district court in this case has effectively denied to the defendants the right to due process of law granted by the Fifth Amendment to the Constitution of the United States. This must mean that states have no rights under the Fifth and Tenth Amendments or that there is an order of priority among the rights protected by the Bill of Rights. We cannot accept such a notion and respectfully say that this Court should not. It is particularly urgent in view of the fact that prior to the district court's decision in this case there was no reason to believe that anything in the plaintiff's complaint warranted offering of evidence to demonstrate a "compelling state interest".

Probably even more important in considering the action of the district court is the fact that the court in effect usurped the states power to regulate the right to vote as protected under Article I, Section 2, Article I, Section 4 and Amendment X to the Constitution of the United States. Article I, Section 2 and Article I, Section 4 have had occasion to be re-examined by this Court in the light of efforts by the United States Congress to enact laws

governing qualifications of voters. As long ago as *Minor* v. *Happersett,* 88 U.S. 162 (1874) in considering the import of Article I, Section 4, particularly on the question of the right of Congress under the Time, Place and Manner Clause stated:

> It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.

In 1970, the Congress did act. In considering the legislation resulting, in *State of Oregon* v. *Mitchell,* 400 U.S. 112, 91 S.Ct. 260 (1970), this Court recognized that the states have a right to determine who may vote except as that right may be restricted by the clear mandate of a provision of the United States Constitution. Under the authority of Article I, Section 2, Article I, Section 4 and the Tenth Amendment to the Constitution of the United States, the State of Illinois acted and neither the district court nor the plaintiff apparently gave any thought to these constitutional provisions. This Court recognized in *Twining* v. *New Jersey,* 211 U.S. 78, 29 S.Ct. 14 (1908) and *Hurtado* v. *California,* 110 U.S. 516, 4 S.Ct. 111 (1884) that each state has a right to govern its people and order its affairs except as the United States Constitution has withdrawn the power. This Court has not ruled that the Constitution has vested in the United States or in any federal court the right to determine who may participate in a particular political party primary or the conditions under which that participation may be had.

The district court, at the time it entered its judgment, was aware that its decision would have a significant impact on the March 21, 1972 Democratic primary that the plaintiff wished to vote in. As Judge Marovitz said in his dissenting opinion (App. 64):

> We would be equally remiss if we were not cognizant of the fact that party allegiances are powerful and can quite easily lead to nefarious inter-party raiding absent any restrictions. [See Dreiske, *GOP Primary Ploy,* Chicago Sun-Times, March 1, 1972, p. 40, which indicates that Republicans are being urged on a large scale to cross over into Democratic Primary on March 21, 1972 since there are no real contest in the Republican Primary. The article indicates that an even greater cross over would take place were it not for the twenty-three month rule.]

The fears of the dissenting judge were well founded. Though the record does not show it, two weeks after the majority's decision, the political commentators were astounded when the Democratic nomination for Governor was won by a candidate who had been given no chance by the established political commentators and analysts. Likewise, the Democratic nomination for State's Attorney of Cook County was won by an individual who had no organized Democratic Party support. Both candidates were nominated with overwhelming support in Republican areas in which the Democratic primary vote reached historic proportions. The Democratic Party nominee for State's Attorney of Cook County did not win in the general election when the same Republican areas turned to the Republican fold. It appears that the majority of the district court was influenced by the political winds blowing across the Northern District of Illinois.

The majority opinion of the district court in its discussion of the "twenty-three month rule" clearly shows that the court substituted its judgment for that of the Illinois legislature. Any thought that the affiliation of twenty-three months required by the Illinois Election Code is too long should be set to rest by the decision of this Court in *Lippitt* v. *Cipollone, supra.* In *Lippitt* the district court found constitutional certain sections of the Ohio Rev. Code regulating candidacy for, and sufferage in primary elections. One of those sections, § 3513.19 provides:

> At a primary election every qualified elector who is eighteen or more years of age, and who is a member of or is affiliated with the political party whose primary election ballot he desires to vote, shall be entitled to vote such ballot at such primary election. It is the duty of any witness or challenger and of any judge or clerk of elections and the right of any elector, whenever he doubts that a person attempting to vote at a primary election is legally entitled to vote at such election, to challenge the right of such person to vote. The right of a person to vote at a primary election may be challenged upon the following grounds:
> (A) That the person whose right to vote is challenged is not a legally qualified elector;
> (B) That he has received or has been promised some valuable reward or consideration for his vote;
> (C) That he is not affiliated with or is not a member of the political party whose ballot he desires to vote.
> Membership in or political affiliation with a political party shall be determined, as to one who has voted in a previous regular state election at which he voted. If he states under oath that at the next preceding regular state election at which he voted, he voted

> for a majority of the candidates of that political party of which, at the time of the challenge, he claims to be a member, or with which he then claims to be affiliated, he shall be deemed to be a member of and affiliated with such political party. If a person states under oath that he has not voted at a previous regular state election and that he desires to be a member of and affiliated with a particular political party, he shall be deemed to be a member of and affiliated with such political party.

A three-judge district court approved of that requirement and on appeal, this Court affirmed the decision of the district court. § 7-43(d) does not require more. The only problem in the case at bar is the question of whether participation in the municipal primary determines the political party in whose primary a voter may participate on the statewide level. This question of state law has not been resolved by the Illinois courts. We suggest that the district court was wrong in deciding that there were no unsettled questions of state law at issue in this case. The Illinois Courts may determine that § 7-43(d) applies separately on each level of government or that it is not a limitation in municipal primaries.

In any event, the decision of the district court was improper and should be set aside.

CONCLUSION.

The district court has ignored the large body of jurisprudence relating to proper pleading and election law and reached a result which is intolerable. For all of the reasons set out in this brief, the defendants pray that this Court reverse the decision of the district court.

Respectfully submitted,

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June 7, 1973

APPENDIX

PERTINENT PROVISIONS OF THE ILLINOIS ELECTION CODE

Deputy Registrars.

§ 6-50.2. If the board of election commisioners determines to appoint deputy registrars as provided in this Section, it shall select deputy registrars in such manner that the convenience of the public is served, giving due consideration to both population concentration and area. There shall be not less than 2 deputy registrars for each 10,000 population, or fraction thereof, in each ward or township. Deputy registrars shall be selected so that there are an equal number of deputy registrars from each of the 2 major political parties in each ward or township. Any qualified elector residing within the jurisdiction of the board of election commissioners, including city, village, incorporated town or township clerks or their duly authorized deputies, may be appointed by the board of election commissioners as a deputy registrar.

A deputy registrar appointed under this Section may accept the registration of any qualified voter residing within the jurisdiction of the board of election commissioners at such place as the board of election commissioners designate at the time of appointment. Such deputy registrars may accept registrations at any time except on any day on which registrations may not be accepted at the office of the board of election commissioners because of the proximity of such day to an election.

(Pertinent Provisions of the Illinois Election Code)

Appointments of deputy registrars under this Section shall be for a term of one year commencing January 1. Each deputy registrar shall take the oath set forth in Section 6-33 in the manner therein provided. The board of election commissioners shall issue a certificate of appointment to each deputy registrar. Such deputy registrars may be paid a reasonable compensation as determined by the board of election commissioners.

The board of election commissioners shall publish the names and addresses of all deputy registrars at least once each year in a newspaper having a general circulation in the city, village or incorporated town. Such publication shall be not less than 30 days nor more than 60 days before the closing of registration for the next election. [Amended by Act Approved Sept. 15, 1969, H.B. 294, Public Act 76-1272.]

Petition for Nomination — Form —Number of Signers — Statement of Candidacy — Requisites — Withdrawal and Revocation of Petition — False Swearing, Perjury and Forgery.

§ 7-10. The name of no candidate for nomination, or State central committeeman, or township committeeman, or precinct committeeman, or ward committeeman or candidate for delegate or alternate delegate to national nominating conventions, shall be printed upon the primary ballot unless a petition for nomination has been filed in his behalf as provided in this Article in substantially the following form:

We, the undersigned, members of and affiliated with the ..... party and qualified primary electors of the ..... party, in the ..... of ....., in the county

(Pertinent Provisions of the Illinois Election Code)

of ..... and State of Illinois, do hereby petition that the following named person or persons shall be a candidate or candidates of the ..... party for the nomination for (or in case of committeemen for election to) the office or offices hereinafter specified, to be voted for at the primary election to be held on the ..... day of ..... A.D. .....

Name	Office	Address
John Jones Thomas Smith	Governor Attorney General	Belvidere, Ill. Oakland, Ill.

Name ..... Address .....

State of Illinois—ss.

County of .....

I, ..., do hereby certify that I am upwards of the age of 21 [18 after July 1, 1972] years, that I reside at No. ..... street, in the ..... of ..... county of ..... and State of Illinois, and that the signatures on this sheet were signed in my presence, and are genuine, and that to the best of my knowledge and belief the persons so signing were at the time of signing the petition qualified voters of the ..... party, and that their respective residences are correctly stated, as above set forth.

.....

Subscribed and sworn to before me this ..... day of ..... A.D. .....

.....

Each sheet of he petition other than the statement of candidacy and candidate's statement shall be of uniform

size and shall contain above the space for signatures an appropriate heading giving the information as to name of candidate or candidates, in whose behalf such petition is signed; the office, the political party represented and place of residence; and the heading of each sheet shall be the same.

Such petition shall be signed by qualified primary electors residing in the political division for which the nomination is sought in their own proper persons only and opposite the signature of each signer, his residence address shall be written or printed (and if a resident of a city having a population of over 10,000 by the then last preceding Federal census, the street number of such residence shall be given). However the county or city, village or town, and state of residence of the electors may be printed on the petition forms where all of the electors signing the petition reside in the same county or city, village or town, and state. Standard abbreviations may be used in writing the residence address, including street number, if any. At the bottom of each sheet of such petition shall be added a statement signed by an adult resident of the political division for which the candidate is seeking a nomination, stating his residence address (and if resident of a city having a population of over 10,000 by the then last preceding Federal census, also stating the street and number of such residence), certifying that the signatures on that sheet of the petition were signed in his presence, and are genuine, and that to the best of his knowledge and belief the persons so signing were at the time of signing the petitions qualified voters of the political party for which a nomination is sought. Such statement shall be sworn to before some officer authorized to administer oaths in this State.

(Pertinent Provisions of the Illinois Election Code)

Such sheets before being filed shall be neatly fastened together in book form, by placing the sheets in a pile and fastening them together at one edge in a secure and suitable manner, and the sheets shall then be numbered consecutively. The sheets shall not be fastened by pasting them together end to end, so as to form a continuous strip or roll. Each petition shall include as a part thereof, a statement of candidacy for each of the candidates filing, or in whose behalf the petition is filed. This statement shall set out the address of such candidate, the office for which he is a candidate, shall state that the candidate is a qualified primary voter of the party to which the petition relates and is qualified for the office specified (in the case of a candidate for State's Attorney it shall state that the candidate is at the time of filing such statement a licensed attorney-at-law of this State), shall request that the candidate's name be placed upon the official ballot, and shall be subscribed and sworn to by such candidate before some officer authorized to take acknowledgment of deeds in the State and shall be in substantially the following form:

Statement of Candidacy

Name	Address	Office	District	Party
John Jones	102 Main St. Belvidere, Illinois	Governor	Statewide	Republican

State of Illinois—ss.
County of .....

I, ..., being first duly sworn, say that I reside at ..... Street in the city (or village) of

(Pertinent Provisions of the Illinois Election Code)

..... in the county of ..... State of Illinois; that I am a qualified voter therein and am a qualified primary voter of the ..... party; that I am a candidate for nomination (for election in the case of committeeman and delegates and alternate delegates) to the office of ..... to be voted upon at the primary election to be held on the ..... day of ..... A.D. .....; and I am legally qualified (including being the holder of any license that may be an eligibility requirement for the office I seek the nomination for) to hold such office and I hereby request that my name be printed upon the official primary ballot for nomination for (or election to in the case of committeemen and delegates and alternate delegates) such office.

Signed .....

Subscribed and sworn to (or affirmed) before me by ....., who is to me personally known, this ..... day of ..... A.D. 19.....

Signed .....

Official character.

(Seal, if officer has one.)

The petitions, when filed, shall not be withdrawn or added to, and no signatures shall be revoked except by revocation filed in writing with the clerk or other proper officer with whom the petition is required to be filed, and before the filing of such petition. Whoever forges the name of a signer upon any petition required by this Article is deemed guilty of a forgery and on conviction thereof shall be punished accordingly.

Petitions of candidates for nomination for offices herein specified, to be filed with the same officer, may contain the

names of 2 or more candidates of the same political party for the same or different offices.

Such petitions for nominations shall be signed:

(a) If for a State office, or for delegate or alternate delegate to be elected from the State at large to a National nominating convention by not less than 5,000 nor more than 10,000 primary electors of his party.

(b) If for a congressional officer or for delegate or alternate delegate to be elected from a congressional district to a national nominating convention by at least one-half of one per cent of the qualified primary electors of his party in his congressional district, except that for the first primary following a redistricting of congressional districts such petitions shall be signed by at least 600 qualified primary electors of the candidate's party in his congressional district.

(c) If for a county office (including county board member and chairman of the county board where elected from the county at large), by at least one-half of one per cent of the qualified electors of his party cast at the last preceding general election in his county. However, if for the nomination for county commissioner of Cook County, then by at least one-half of one per cent of the qualified primary electors of his party in his county in the district or division in which such person is a candidate for nomination; and if for county board member from a county board district, then by at least one-half of one per cent of the qualified primary electors of his party in the county board district.

(d) If for a city, incorporated town, town or village office to be filled by the electors of the entire city, incorporated town, town or village, by at least one-half of one per cent of the qualified primary electors of his party in the

city, incorporated town, town or village; if for alderman, by at least one-half of one per cent of the voters of his party of his ward.

(e) If for State central committeeman, by at least 100 of the primary electors of his party of his congressional district.

(f) If for a candidate for trustee of a sanitary district, by at least one-half of one per cent of the primary electors of his party, from such sanitary district.

(g) If for a candidate for judicial office, by at least 500 qualified primary electors of his judicial district or circuit, as the case may be.

(h) If for a candidate for precinct committeeman, by at least 10 primary electors of his party of his precinct; if for a candidate for ward committeeman, by not less than 10% nor more than 16% of the primary electors of his party of his ward; if for a candidate for township committeeman, by not less than 5% nor more than 8% of the primary electors of his party in his township or part of a township as the case may be.

(i) If for any other office by at least 10 primary electors of his party of the district or division for which nomination is made.

For the purposes of this Section, when a petition is to be filed with the Secretary of State, the number of primary electors shall be determined by taking the total vote cast, in the applicable district, for the candidate for such poltical party who received the highest number of votes, state-wide, at the last general election in the State. In other subdivisions of the State, municipality, or subdivision thereof, the number of primary electors shall be determined by taking the total vote cast for the candidate for such political party

who received the highest number of votes in the State, subdivision thereof, or municipality or subdivision thereof, at the last general or municipal election within the same.

For the purpose of determining eligibility to sign a petition for nomination or eligibility to be a candidate under this Article, a "qualified primary elector" of a party (1) is an elector who has not requested a primary ballot of any other party at a primary election held within 2 years of the date on which the petition must be filed or (2) is a first-time voter in this State registered since the last primary of an even numbered year preceding the date on which the petition must be filed, but no such person may sign petitions for or be a candidate in the primary of more than one party. However, in the case of the first primary following the election at which a party first qualifies as a "political party", as defined in Section 7-2, a "qualified primary elector" of such party is an elector who has not requested a primary ballot of any other party at any primary election held within 2 years of the date on which the petition must be filed.

Judges of primary.

§ 7-26. The judges of general elections for state and county officers, for city and village officers and for incorporated town, town and other municipal officers, are hereby constituted respectively the judges of primary elections in their respective precincts, under the provisions of this Article.

Judges absent, etc. — Vacancies.

§ 7-28. If, at the time for opening of a primary, one of the primary judges be absent, or refuse to act, the judges

present shall appoint some qualified primary elector of the precinct to act in his place. If two of the primary judges be absent or refuse to act, the judge present shall fill the vacancies in the same manner, as above provided. If all of the primary judges be absent, or refuse to act, the primary electors present, who reside in the precinct, shall select the appropriate number of themselves to act as primary judges. The judges so selected and appointed shall take the same oath, have the same powers, and perform the same duties and be subject to the same penalties as regularly constituted election judges. [Amended by Act approved July 6, 1957.]

Voter—Party Affiliation, etc.

§ 7-44. Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges, one of whom shall thereupon announce the same in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. When Article 4, 5 or 6 is applicable the Certificate of Registered Voter therein prescribed shall be made and signed and the official poll record shall be made. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one, primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as herein provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary.

(Pertinent Provisions of the Illinois Election Code)

Challenged Voter — Affidavits — Form.

§ 7-45. Whenever a person offering to vote at a primary is challenged, the person so challenged shall make and subscribe an affidavit in the following form, which shall be presented to and retained by the primary judges and returned by them affixed to the primary poll book or with the official poll record:

State of Illinois—ss.

County of .....

I ..... do solemnly swear (or affirm) that I am a citizen of the United States, of the age of 21 years or over, and am qualified to vote under and by virtue of the Constitution and laws of the State of Illinois and am a legally qualified voter of the precinct; that I now reside at ..... (insert street and number, if any) in this precinct, and am a member of and affiliated with the .... party that I have not voted at a primary of another political party within a period of 23 calendar months prior to the calendar month in which this primary is being held and that I voted at the ..... city, village, incorporated town, or town primary, with the ..... political party at the ..... election held in ..... A.D. .... which the .... political party was entitled at such primary to make nominations of candidates for city, village, incorporated town or town offices only, and for no other offices, and that the name or names of no candidate or candidates of the ..... political party (the political party with which the primary elector declares himself affiliated) were, at such city, village, incorporated town or town primary, printed on the primary ballot that I have not signed the petition for nomination of a candidate of a political party with which

(Pertinent Provisions of the Illinois Election Code)

I am not affiliated, and that I have not signed the nominating papers of an independent candidate for any office for which office candidates for nomination are voted for at this primary.

.....

Subscribed and sworn to before me, this ..... day of ..... A.D. .....

.....

Judge of Primary

In addition to such affidavit the person so challenged shall produce the affidavit of one voter of the precinct, who shall be a qualified voter at such primary, and who shall be personally known or proved to the judges to be a voter in the precinct, which affidavit shall be in the following form:

State of Illinois—ss.

County of .....

I, ..., do solemnly swear (or affirm) that I am a voter of this precinct and entitled to vote at this primary; that I am acquainted with ..... (name of the party challenged), whose right to vote at this primary has been challenged; that I know him to be an actual bona fide resident of this precinct, and that he has resided herein 30 days, and I verily believe he has resided in this State 6 months next preceding this primary; that I verily believe he is a member of and affiliated with the ..... party.

.....

Subscribed and sworn to before me, this ..... day of ..... A.D. .....

.....

Judge of Primary

[Amended by Public Act 77-1653, effective September 27, 1971.]

(Pertinent Provisions of the Illinois Election Code)

Selection of Judges of Election in Each Precinct.

§ 14-1. The board of election commissioners established or existing under Article 6 shall, at the time and in the manner provided in Section 14-3.1, select and choose 5 electors, men or women, as judges of election for each precinct in such city, village or incorporated town.

Where neither voting machines nor electronic, mechanical or electric voting systems are used, the board of election commissioners may, for any precinct with respect to which the board considers such action necessary or desirable in view of the number of voters, and shall for general elections for any precinct containing more than 600 registered voters, appoint in addition to the 5 judges of election a team of 5 tally judges. In such precincts the judges of election shall preside over the election during the hours the polls are open, and the tally judges, with the assistance of the holdover judges designated pursuant to Section 14-5.2, shall count the vote after the closing of the polls. The tally judges shall possess the same qualifications and shall be appointed in the same manner and with the same division between political parties as is provided for judges of election. The foregoing provisions relating to the appointment of tally judges are inapplicable in counties with a population of 1,000,000 or more.

To qualify as judges the electors must:

(1) be citizens of the United States;

(2) be of good repute and character;

(3) be able to speak, read and write the English language;

(4) be skilled in the 4 fundamental rules of mathematics;

(Pertinent Provisions of the Illinois Election Code)

(5) be of good understanding and capable;

(6) not be candidates for any office at the election and not be elected committeemen;

(7) reside and be entitled to vote in the precinct in which they are selected to serve, except that in each precinct not more than one judge of each party may be appointed from outside such precinct. Any judge so appointed to serve in any precinct in which he is not entitled to vote must be entitled to vote elsewhere within the county which encompasses the precinct in which such judge is appointed and such judge must otherwise meet the qualifications of this Section.

The board of election commissioners may select 2 additional judges of election, one from each of the major political parties, for each 200 voters in excess of 600 in any precinct having more than 600 voters as authorized by Section 11-3. These additional judges must meet the qualifications prescribed in this Section. [Amended by Act approved September 15, 1969, Public Act 76-1224, S.B. 129.]

§ 14-2. (Repealed by Act approved June 27, 1967.)

§ 14-3. (Repealed by Act approved August 20, 1969, Public Act 76-881, SB 383.)

Selection of Judges.

§ 14-3.1. The board of election commissioners shall, during the month of January of each even-numbered year starting with 1968, select for each election precinct within the jurisdiction of the board 5 persons to be judges of election who shall possess the qualifications required by this Act for such judges. For each precinct, 3 judges shall be selected from one of the 2 leading political parties and the other 2 judges shall be selected from the other leading

political party. The parties entitled to 3 and 2 judges, respectively, in the several precincts shall be determined as provided in Section 14-4. The board of election commissioners shall make the selections of persons qualified under Section 14-1 from certified lists furnished by the chairman of the respective county central committees of the 2 leading political parties. Such list shall be arranged according to precincts. The chairman of each county central committee shall, insofar as possible, list persons who reside within the precinct in which they are to serve as judges. However, he may, in his sole discretion, submit the names of persons who reside outside the precinct but within the county embracing the precinct in which they are to serve. He must, however, submit the names of at least 2 residents of the precinct for each precinct in which his party is to have 3 judges and must submit the name of at least one resident of the precinct for each precinct in which his party is to have 2 judges. The board of election commissioners shall no later than November 1, 1967 and November 1 of each odd-numbered year thereafter notify the chairmen of the respective county central committees of their responsibility to furnish such lists, and each such chairman shall furnish the board of election commissioners with the list for his party on or before December 31, 1967, and December 31, of each odd-numbered year thereafter. If no such list is furnished or if no names or an insufficient number of names are furnished for certain precincts, the board of election commissioners shall make or complete such list from the names contained in the supplemental list provided for in Section 14-3.2. Judges of election shall hold their office for 2 years from their appointment and until their successors are duly appointed in the manner herein provided. The

board of election commissioners shall, subject to the provisions of Section 14-3.2, fill all vacancies in the office of judges of election at any time in the manner herein provided.

Such selections under this Section shall be confirmed by the court as provided in Section 14-5. [Added by Act approved June 27, 1967.]

Supplemental Lists.

§ 14-3.2. In addition to the list provided for in Section 14-3.1, the chairman of the county central committee of each of the 2 leading political parties shall furnish to the board of election commissioners a supplemental list, arranged according to precinct in which they are to serve, of persons available as judges of election. The board of election commissioners shall select from this supplemental list persons qualified under Section 14-1, to fill vacancies among the judges of election. If the list provided for in Section 14-3.1 for any precinct is exhausted, then selection shall be made from the supplemental list furnished by the chairman of the county central committee of the party. If such supplemental list is exhausted for any precinct, then selection shall be made from any of the persons on the supplemental list without regard to the precincts in which they are listed to serve. In any case where selection cannot be made from the supplemental list without violating Section 14-1, selection shall be made from outside the supplemental list of some person qualified under Section 14-1. [Added by Act approved June 27, 1967.]

(Pertinent Provisions of the Illinois Election Code)

Representation of Leading Political Parties in the Selection of Judges of Election.

§ 14-4. The leading political party represented by minority of all the commissioners in the board shall be entitled to 2 of the judges in each precinct with an even number, and 3 of the judges in each precinct with an odd number, and the other leading political party shall be entitled to 3 judges in the even and 2 judges in the odd number precincts, and it shall be the duty of such commissioners to observe this division in all respects in making such appointments. [Amended by Act approved June 27, 1967.]

Absence of Judges — Where Absence Wilful — Detaining Registers, etc.

§ 14-6. If, in any municipality operating under Article 6 of this Act, any judge shall not be present after the expiration of 15 minutes from the time to open the polls, or within 15 minutes from the time of closing the polls in the case of a judge appointed to count the vote or if any judge becomes ill or if any member of his immediate family becomes ill such judge may be excused from further attendance, and the judge or judges present shall fill the place of such absent judge, always selecting a person of the same political party as the party absent. One of the judges shall administer to such substitute the oath as required of the judge originally appointed, and blank forms shall be sent out by the commissioners for such purpose, which oath shall be preserved and returned to the commissioners, and such appointee shall be considered an officer of the county court, and subject to the same punishment and penalties as any other judge. Whenever such regular judge shall be

present such substitute shall cease to act. No judge shall knowingly absent himself from the polls on election day, without good cause. No judge shall knowingly detain any register or poll book or cause it not to be produced at the polling place at the opening of the polls, or for not more than 15 minutes thereafter. [Amended by Act approved September 15, 1969, Public Act 76-1224, S.B. 129.]

Assistance to Illiterate and Disabled Voters.

§ 17-14. Any voter who declares upon oath, properly witnessed and with his signature or mark affixed, that he cannot read the English language shall, upon request, be assisted in marking his ballot, by 2 of the election officers of different political parties, to be selected from the judges of the precinct in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls. A voter who declares upon oath, properly witnessed, that by reason of any physical disability he is unable to mark his ballot shall, upon request, be assisted in marking his ballot by 2 of the election officers of different parties as provided above in this Section or by a relative or friend of his selection. Such voter shall state specifically what his physical disability is and the reason why he cannot vote without assistance and as to whether or not the disability is permanent. Such relative, friend or officers shall mark the ballot as directed by the voter, and shall thereafter give no information regarding the same. The judges of election shall enter upon the poll lists or official poll record after the name of any elector who received such assistance in marking his ballot a memorandum of the fact and if the disability is permanent. Intoxication shall not

be regarded as a physical disability, and no intoxicated person shall be entitled to assistance in marking his ballot.

No person shall secure or attempt to secure assistance in voting who is not physically disabled or illiterate as herein provided, nor shall any election official knowingly assist a person in voting contrary to the provisions of this Section. [Amended by Act approved September 1, 1967.]

Canvass of Votes.

§ 17-18. Immediately upon closing the polls the judges shall proceed to canvass the votes polled. They shall first count the whole number of ballots in the box. If 2 or more ballots are folded together so as to appear to have been cast by the same person, all of the ballots so folded together shall be marked and returned with the other ballots in the same conditions, as near as may be, in which they were found when first opened, but shall not be counted. If the remaining ballots shall be found to exceed the number of names entered on each of the poll lists or official poll record, the ballots shall be replaced in the box, and the box closed and well shaken and again opened and one of the judges shall publicly draw out and destroy so many ballots unopened as shall be equal to such excess; and the number of ballots agreeing with the poll lists, or being made to agree, the board shall then proceed to count and estimate and publish the votes; and when the judges of election shall open and read the ballots, 3 judges, with at least one from each political party from which the precinct judges were chosen, shall carefully and correctly mark down upon the three tally sheets the vote each candidate has received, in a separate box prepared for that purpose, with the name of such candidate at the head of such box, and the office

designated by the votes such candidate shall fill. Whenever a proposition is submitted to the electors at the same election, the ballots for or against such proposition shall always be canvassed, counted and tallied after the names of candidates for any office are canvassed, counted or tallied. The votes shall be canvassed in the room or place where the election is held, and the judges shall not allow the ballot box, or any of the ballots, or either of the poll lists or record, or any of the tally sheets to be removed or carried away from such room or place, until the canvass of the vote is completed, and the returns carefully enveloped and sealed up as provided by law.

In any election in which Representatives in the General Assembly are elected from the State at large, the vote for Representatives in the General Assembly shall be canvassed in the manner provided in Article 8A.

Where voting machines or electronic voting systems are used, the provisions of this section may be modified as required or authorized by Article 24 or Article 24A, whichever is applicable. [Amended by Act approved August 2, 1965.] [S.B. 791]

Judicial Retention Ballot Exceeding 15—Special Judges.

§ 17-18.1. Wherever the judicial retention ballot to be used in the election of November 1970 contains the names of more than 15 judges, the County Clerk or Board of Election Commissioners as the case may be, shall designate special judges of election for the purpose of tallying and canvassing the votes cast for and against the propositions for the retention of judges in office in such places and at such times as the County Clerk or Board of Election Commissioners determine. Special judges of election shall be

designated from certified lists submitted by the respective chairmen of the county central committees of the two leading political parties. In the event that the County Clerk or Board of Election Commissioners, as the case may be, decides that the counting of the retention ballots shall be performed in the precinct where such ballots are cast, an odd number of special judges of election shall be designated to tally and canvass the vote of each precinct with one more being named from the party having the majority of regular judges of election in that precinct than from the other of the 2 leading political parties. In the event that the County Clerk or Board of Election Commissioners decides that the judicial retention ballots from several precincts shall be tallied and canvassed in a central or common location, then each major political party shall be entitled to an equal number of special election judges in each such central or common location. The County Clerk or Board of Election Commissioners, as the case may be, shall inform, no later than July 15, 1970, the respective chairmen of the county central committees of the location or locations where the counting of retention ballots will be done, the number of names to be included on the certified lists, and the number of special election judges to be selected from those lists. If the certified list for either party is not submitted within thirty days after the chairmen have been so informed, the County Clerk or Board of Election Commissioners shall designate special judges of election for that party in whatever manner it determines.

The County Clerk or Board of Election Commissioners shall apply to the Circuit Court for the confirmation of the special judges of election designated under this Section. The court shall confirm or refuse to confirm such desig-

nations as the interest of the public may require. Those confirmed shall be officers of the court and subject to its disciplinary powers.

The County Clerk or Board of Election Commissioners shall, in the exercise of sound discretion, prescribe the forms, materials and supplies together with the procedures for completion and return thereof for use in such election by special judges of election. The special judges of election designated under this Section shall have full responsibility and authority for tallying and canvassing the votes pertaining to the retention of judges and the return of ballots and supplies.

The compensation of a special judge of election may not exceed $20 per judge per precinct or district canvassed.

This Section does not affect any other office or the conduct of any other election held at the same time as the election for the retention of judges in office. [Added by Act approved July 7, 1970, H.B. 3829, P.A. 76-2562.]

Manner of Canvassing Votes—Announcement.

§ 18-9. The judges of election shall first count the whole number of ballots in the box. If the ballots shall be found to exceed the number of names entered on each of the poll lists, they shall reject the ballots, if any, found folded inside of a ballot. And if the ballot and the poll lists still do not agree after such rejection, they shall reject as many of the ballots as may be necessary to make the ballots agree in number with the names entered on each of the poll lists; the ballots shall be replaced in the box and the box closed and well shaken, and again opened; and one of the judges shall publicly draw out and destroy so many ballots unopened as shall be equal to such excess. And the ballots or

poll lists agreeing, or being made to agree in this way, the board shall proceed to count the votes in the following manner: The judges shall open the ballots and place those which contain the same names together, so that the several kinds shall be in separate piles or on separate files. Each of the judges shall examine the separate files which are, or are supposed to be, alike, and exclude from such files any which may have a name or an erasure, or in any manner shall be different from the others of such file. One of the judges shall then take one file of the kind of ballots which contain the same names, and count them by tens, carefully examining each name on each of the ballots. Such judge shall then pass the ten ballots aforesaid to the judge sitting next to him, who shall count them in the same manner, who shall then pass them to a third judge, who shall also count them in the same manner. Then the third judge shall call the names of the persons named in the ten ballots, and the offices for which they are designated, and 2 of the judges, who did not assist in the counting shall tally ten votes for each of such persons, except as herein otherwise provided. When the judges shall have gone through such file of ballots, containing the same names, and shall count them by tens in the same way, and shall call the names of the persons named in the ballots and the office for which they are designated, the tally judges shall tally the votes by tens for each of such persons in the same manner as in the first instance. When the counting of each file of ballots which contain the same names shall be completed, the tally judges shall compare their tallies together and ascertain the total number of ballots of that kind so canvassed; and when they agree upon the number, one of them shall announce it in a loud voice to the other judges. The

judges shall then canvass the other kinds of ballots which do not correspond, those containing names partly from one kind of ballots and partly from another, being those usually called "split tickets", and those from which the name of the person proper to be voted for on such ballots has been omitted or erased, usually called "scratched tickets". They shall be canvassed separately by one of the judges sitting between 2 other judges, which judge shall call each name to the tally judges and the office for which it is designated, and the other judges looking at the ballot at the same time, and the tally judges making tally of the same. When all the ballots have been canvassed in this manner, the tally judges shall compare their tallies together, and ascertain the total number of votes received by each candidate and when they agree upon the numbers one of them shall announce in a loud voice to the judges the number of votes received by each candidate on each of the kinds of ballots containing his name, the number received by him on the split and scratch tickets, and the total number of votes received by him. The provisions of section 17-19 of Article 17 shall apply to the tallying of votes on straight tickets.

The votes for the offices of Governor and Lieutenant Governor shall be counted and tallied jointly.

Where voting machines or electronic voting systems are used, the provisions of this section may be modified as required or authorized by Article 24 or Article 24A, whichever is applicable. [Amended by Public Act 77-1762, effective December 8, 1971.]

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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court
Of The Northern District Of Illinois

BRIEF OF APPELLEE

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court
Of The Northern District Of Illinois

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant neglected to include certain additional elements in the statement of the case. Within a few dates after the filing of this case a similar case was in the same district. *Donna Klaetsch and Peter Lombardo* v. *Grace Mary Stern, County Clerk,* Civil Action No. 71C2415. These cases were consolidated for argument and decision

since the issues were identical. For reasons beyond appellee's knowledge the *Klaetsch* case is not before this court. The defendant below apparently is not interested in pursuing the appeal.

An injunction issued by the court against enforcement of the statute in the March 21, 1972 primary. Mrs. Pontikes cast a ballot in the Democratic Primary.

SUMMARY OF THE ARGUMENT

The three judge panel correctly interpreted the case as a controversy ripe for decision. The parties were in an adversary relationship to one another. The statute in question if upheld would deny relief to the plaintiff; if the statute was ruled unconstitutional Mrs. Pontikes would be allowed to vote as she wished. Since it was not a criminal case, there was no way to ripen the case and Declaratory Judgment was the only relief available.

There was jurisdiction in the case since there was a substantial federal question: whether Ch. 46, Sec. 7-43d (Ill. Rev. Stats. 1971) was constitutional. The standard enunciated by Justice Cardozo was not in that the interpretation of the state law in light of the Constitution was determinative of the issues.

A three judge court was the only judicial body which could legally decide the case under 28 U.S.C. 2281 since a state law was alleged to be unconstitutional. The statute was statewide in effect, carried out by officers delegated with responsibility to execute it. Voting is clearly such a substantial question as to justify the use of a three judge panel. Election cases challenging state laws have almost exclusively been decided by three judge panels.

The doctrine of abstention is not applicable. This only should be decided without reaching the constitutional question. That is impossible here. The only Illinois case involving the statute's predecessor left the question open and the constitutional objections weren't raised. The Federal Courts have decided a score of cases involving state election law recently.

The Court should affirm the district court decision striking down the Illinois statute as unconstitutional. Although the two party system is a valued part of our democracy it has restraints placed upon it. The rights of parties must yield to the rights of voters. The allowable limits on candidates rights are distinguishable since candidacy is a privilege and voting as a right. The courts must recognize the right to change political allegiance or attitudes as it has the right to change residence.

ARGUMENT

I.

THE CASE WAS NOT A HYPOTHETICAL ONE WHEN BEFORE THE THREE JUDGE COURT, BUT WAS ONE RIPE FOR DECISION.

The appellants claim that the three judge panel went beyond the four corners of the pleadings to read into the pleadings sufficient basis to decide the issues. The appellants have neglected to note the complaint (App. 2) makes reference to a plea for Injunctive relief in its headings; additionally, there is a reference to Title 28, Sec. 1983, which was clearly meant to read Title 42. There is further reference to Title 28, Sec. 2281 and 2284 U.S.C. in the application for three judge panel (App. 6) and the brief in support thereof (App. 7). Surely appellants do not rely on a scrivener's error as grounds for reversal of a case which affects the voting rights of hundreds of thousands of Illinois residents.

The relief granted by the court was clearly consistent with the prayer for relief in the complaint, paragraphs 2 and 3 (App. 5).

The question of when a matter is hypothetical and when it is ripe for decision via declaratory judgment is one which has long troubled courts and commentators. The fine line which separates the hypothetical from the controverted must be examined. The courts have offered some guidance. Basically, the question in each case is whether the facts averred under the existing circumstances present a real controversy between parties having adverse legal

interests of such immediacy and reality to warrant a declaratory judgment. *Altwater* v. *Freeman*, 1943, 319 U.S. 359, 63 S.Ct. 1115, 87 L.Ed. 1450; *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 1941, 312 U.S. 27, 61 S.Ct. 510, 85 L.Ed. 826.

A case cited by appellants—*Aetna Life Insurance Co. of Hartford, Conn.* v. *Haworth*, 1937, 367 U.S. 497, 57 S.Ct. 461, 81 L.Ed. 617, involved an insurance policy, as declaratory judgment cases so often do, where although the court was given us when the court said that such a case must be ruled there was no case or controversy a useful standard "definite and concrete touching legal relations of parties and a dispute between parties who face each other."

Obviously, the facts of each case must be measured against this standard. Although the cases cited by appellant may not measure up, the instant case certainly does. There is clearly a controversy. The statute in question, Ch. 46, Sec. 7-43d (Ill. Rev. Stats. 1971) prohibited the plaintiffs (plural is used due to the companion case *Klaetsch* v. *Stern* heretofore mentioned in the statement of the case) from doing what they wished to do,—to-wit: vote in the Democratic party primary on March 21, 1972.

The adversity of interests of the parties is equally clear. It is the duty of the defendants to execute the statute in question. Ch. 46, Sec. 6-21 (Ill. Rev. Stats. 1971). The plaintiffs say in their et seq. complaints that they wish to be allowed to act contrary to the statute and pray the Court bar the defendants from carrying out their statutory duty. What could be more adverse?

The immediacy spoken of in the above cited cases is implicit in any election case.

Appellant's brief also cites *Poe* v. *Ullman*, 1961, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed. 2d 989 is authority for its position that no case or controversy exists. In that case plaintiffs sought to enjoin a Connecticut statute barring dissemination of birth control devices on the grounds that it was unconstitutional. The Supreme Court refused to entertain the plaintiffs' claim since there had been no showing that plaintiffs were in imminent danger of being affected by the statute through criminal prosecution. In a concurring opinion, Justice Brennan noted that there was time to decide the matter—if and when the plaintiffs were prosecuted under the statute.

In fact, the plaintiffs subsequently were prosecuted after committing the prohibited acts. The statute was eventually ruled unconstitutional in *Griswold* v. *Connecticut*, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510. At this point the case was ripe.

Unfortunately, there was no way in which Harriet Pontikes could "ripen" her case. She could not do the prohibited act—vote—because the defendants could effectively prevent it by not giving her access to the voting machine. It was impossible. In the case of criminal statute one who wishes to challenge the law can do so by breaking it and awaiting prosecution. Thus, there is no need to decide the question until that point. It is conceivable that the applicable government authorities might never seek to enforce the statute.

The instant case provided less desirable options. Either the plaintiff could challenge the statute or forfeit her right to vote for the candidate of her choice in 1972. By 1974, she could have voted in any primary without violating the statute. It would then the February, 1975 pri-

mary before the question could then arise. If she had foreborn and not voted or voted in the Republican primary where there was only one "contest", and that of no significance, the question presented would be moot. Obviously, the Court could not adjudicate it at that point.

Additionally, the franchise is a unique and integral part of our democracy. There is no way in which the plaintiff could have been compensated for her loss. What would a court do after an election when presented with thousands of persons who had wished to vote for a candidate who had narrowly been defeated when the persons votes had been "lost" due to a statute later held to be unconstitutional. Reverse the election? Hardly. The most practical solution would be to adjudicate the rights at a time when there is a controversy and it can be resolved without great upset to the parties and others affected by the decision.

Appellants decry the lack of evidence especially with respect to the question of party raiding (which will be discussed at great length *infra*). Yet they produced no affidavits to substantiate their political theories which they seek to weave into facts.

The fact that plaintiff was part of a group being discriminated against is also implicit from two facts. One, a similar law suit was filed in the same district on behalf of other voters in another of the 103 election districts against their County Clerk. Secondly, it should be apparent that others voted in the February, 1971 Republican primary other than the plaintiff.

Cases questioning the constitutionality of an election statute have been consistently heard by the Courts prior to the election and treated as justiciable. *Williams* v. *Rhodes*, 1968, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed. 2d 24.

Rosario v. *Rockefeller*, ... U.S. ....., 93 ST 1245, ... L.Ed. 2d ..... (1973); *Bendinger* v. *Ogilvie*, 335 F. Supp. 572 (N.D. Ill. 1971); *Jackson* v. *Ogilvie*, 401 U.S. 904, 91 S.Ct. 642 (1971).

Clearly the case presented was ready for and in need of adjudication.

II.

THE THREE JUDGE DISTRICT COURT HAD JURISDICTION TO DECIDE THIS CASE.

The appellants next contend that a Federal Court has no jurisdiction to decide a case which seeks to hold state law to be in derogation to the United States Constitution and thus unconstitutionally invalid. The cases cited clearly are not in point.

In *McNutt* v. *General Motors Acceptance Corporation of Indiana, Inc.*, 298 U.S. 178, 56 S.Ct. 780 (1936), jurisdiction was ultimately denied because plaintiff could not show presence of the jurisdictional amount. This has no relevance to the instant case where the jurisdiction is based on the presence of a "Federal question".

The appellant's brief also relies upon *Pan American Petro Corp.* v. *Superior Court of Delaware*, 366 U.S. 656, 81 S.Ct. 1303 (1961). In that case the cause was dismissed for want of jurisdiction because the facts showed that the cause of action arose under state law. This hardly is the case herein, where the plaintiff prays non application of state law due to the Federal Constitution.

Nor can the cases which relate to anticipated defenses be used by the appellant to substantiate their position. In the case of *Gully* v. *First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96 (1930) the Court found that the

facts set forth in the complaint did not raise a federal question and the plaintiff could not rely on the defense interposed by the defendants to establish the court's jurisdiction.

It was in the *Gully* case, supra, that Justice Cardozo restated the test for determining the existence of a Federal question:

> "The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if it receives another." *First National Bank* v. *Williams,* 252 U.S. 504, 512, 40 S.Ct. 372, 374; *King County* v. *Seattle School District,* 263 U.S. 361, 363, 364, 44 S.Ct. 127, 128.

The instant case meets this test favorably. If the constitutionally guaranteed right to vote can be inhibited by the state law and can be limited to the party primary which the person last voted in, then plaintiff goes without day. If, as appellee and the District Court contend, the Constitution bars such a limitation, the statute is unconstitutional. Either the state is permitted to so limit the admitted right of the plaintiff or it is not. Only the United States Constitution could "overrule" a state statute since the Illinois Constitution is no way involved. No other law could be supreme in juxtaposition to the Illinois statute.

The appellants assert that the complaint fails to state a cause of action since it does not reflect a right upon which to sustain a claim. The brief submitted questions the conclusionary assertion of the violation of a right as being sufficient under Rule 8(a) F.R.Civ.P. At some point in every complaint, there must be the conclusion necessary to focus the facts alleged into a violated right. This is what has been done in paragraph 8 of the complaint. With-

out this, the defendant would not be apprised of the basis upon which the plaintiff's cause of action rests.

The recitation of case after case where the 14th Amendment was used to strike down laws which caused racial or ethnic discrimination is bewildering. None of the cases cited state that laws will only be considered violative of the 14th Amendment if there is racial discrimination. The same is true of the cases cited detailing the granting of relief from discrimination against the poor. Nowhere in the Constitution or the cases listed is it stated that the protection of the 14th Amendment is exclusively vested in the poor or the racial minorities. One need not show racial or economic discrimination to invoke the 14th Amendment to protect one's rights.

In fact, the language in *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S.Ct. 1943, 1496 (1969) indicates to the contrary.

> "*All* procedures used by a state as an integral part of the election process must pass muster against charges of discrimination." (italics added)

The question of group discrimination is misunderstood by the appellant. Plaintiff was clearly not an isolated person among millions of Illinois residents who rights were affected. To believe this is an absurd view of reality. The case of *Williams* v. *Rhodes*, supra, discussed at length the question of free association.

In *Williams*, the plaintiffs sought to place candidates of a "3rd" political party on the ballot. Ohio law placed severe restrictions so doing by requiring huge numbers of signatures to be affixed to petitions of said new party. This was challenged as denial of the Equal Protection of the laws as prohibited by the 14th Amendment. The Court found the Constitution protects the same right which is

asserted herein—the right to case an effective vote. At 393 U.S. 29, 30, the court said

> "in the present situation the state laws place burdens on two different, although overlapping, kinds of rights —the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States."

Similarly, in the cases of *Rosario* v. *Rockefeller* supra, *Gordon* v. *Executive Committee, of the Democratic Party of the City of Charleston* (DC SC 1971) 335 F. Supp. 166, the rights asserted herein where recognized.

Appellants next claim that the state can regulate election laws under Article I, Sec. 2 of the U.S. Constitution. *Oregon* v. *Mitchell,* 400 U.S. 112, 91 S.Ct. 260 (1970) is cited in support thereof, although that case discussed the matter of the state's prerogative with respect to age qualification for voters. This right to regulate elections is clearly limited under Amendments I and 14 of the U.S. Constitution. *Williams* v. *Rhodes* supra; *Smith* v. *Allwright,* 321 U.S. 649, 64 S.Ct. 757 (1944); *United States* v. *Classic,* 313 U.S. 299, 318 61 S.Ct 1031, 85 L.Ed 1368 (1941).

The association through actual physical gathering together of the plaintiff with others is not a condition precedent to her assertion of her right to vote. However, the coincidental filing of the *Klaetsch* case belies the de-

fense interposed. Further, the attention is again called to the language in Williams previously cited with respect to the co-existence of the similarly constituted right to cast an "effective vote."

Plaintiff clearly has a problem common with many other of the 439,712 voters who voted in the February 1971 primary. The fact that the defendants recognized this right when subsequent to the ruling by the District Court they issued an order granting uniform application of the decision (Ex. 1). The defendants recognized the group as well as the Court did.

The spurious nature of the defendant—appellant's contention is seen by the almost incidental treatment given it by the District Court in two sentences (App. 42). Even the dissent does not agree with the position of the appellant (App. 50).

There is jurisdiction to decide the case.

III.

THE MATTER WAS PROPERLY DECIDED BY A THREE JUDGE DISTRICT COURT.

The appellant further challenges the formation of a three judge panel to decide the case although this same argument was refused and rejected by the very trial judge who dissented at the District Court level in the determinative portion of the case. (App. 11-15, App. 50)

The jurisdiction of a three judge panel is sought under 28 U.S.C. 2281 which provides:

> "Injunction Against Enforcement Of State Statute—Three-Judge Court Required—An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by re-

> straining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

There is no option in the parties—there must be a three judge panel convened. The test which appellants try to apply boil down to a single principle—is it a state statute with statewide application by an officer delegated to so act by statute in a substantial case.

Moody v. *Flowers,* 387 U.S. 97, 87 S.Ct. 1544 (1967) was a case in which a county reapportionment act was attacked. Since it involved two cases each of which involved a county body making a decision for the county residents, it was held that a three judge panel was improper. There was no statewide effect.

Such is not the case here. The section of the statute attacked is applicable to all of the residents of Illinois—not just one county. The defendants are delegated the duty of enforcing the law. In Illinois there are 102 counties. Each of the 101 "downstate" counties (everything in Illinois outside Cook County is euphemistically called downstate even if it is North of Cook County) has jurisdiction over its elections and this power is reposed in the County Clerks (Ch. 46, Sec. 4-1 et seq. Ill. Rev. Stats. 1971.) In Cook County, the City of Chicago and certain few suburbs or "country towns" are under the jurisdiction of the defendants herein. The remaining towns of Cook County are under the jurisdiction of the Cook County

Clerk and Cook County Board (CH. 43, Sec. 5-1 et seq. Ill. Rev. Stats.). Thus, the state has delegated the responsibilities of administering the law in question to various convenient subdivisions. But it is the same law which is being administered by various local officials in the same as County State's Attorneys prosecute violations as the Criminal Code.

The only remaining standard to be met is that of a substantial federal question. One of the cases cited by appellant's brief, *Swift & Company* v. *Wickham*, 382 U.S. 111, 120, 86 S.Ct. 258, 263 (1965) was indeed one where the Court ruled a three judge panel inappropriate and unnecessary. This case involved an alleged conflict between state and Federal labelling laws for frozen turkeys. The court found that there was present a question of the Supremacy clause, not a constitutional issue, and said "Sec. 2281 was designed to provide a more responsible forum for litigation of suits which, if successful, would render void state statute embodying *important* (italics added) state policies."

Peter Finley Dunne's philosophical bartender of another era once observed "politics ain't beanbag." Perhaps one could analogize that "voting isn't turkeys." There, can be no more important statutes than those with respect to the franchise.

This is why courts across the land have practically, without exception, decided cases involving state electoral laws by a three judge court. *Williams* v. *Rhodes, supra, Bendinger* v. *Ogilvie,* supra, *Gordon* v. *Executive Committee, supra; Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691 7 L.Ed. 2d 663 (1962) *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 506 (1964); *NAACP* v. *But-*

ton, 371 U.S. 415 1963); *Jackson* v. *Ogilvie*, supra; *Howard* v. *Ladner*, 116 F. Supp D.C. Miss 1953); *Stokes* v. *Fortsor*, 234 F.Supp. 575 (D.C. Ga. 1964) *Vottagio* v. *Caputo*, 210 F.Supp. 337 (D.C. NJ 1962).

There was no proper legal alternative to the three judge court. The system was devised so that an important state law could not be overturned by a single District judge. It was cases such as this that Congress must have in mind when Sec. 2281 - Sec. 2284 were enacted.

In the very district in which the case was brought, the three judge panel had been invoked in *Jackson* supra and *Bendinger*, supra as well as *Romiti* v. *Kerner*, 256 F.Supp. 35 (D.C. Ill. 1966) where the plaintiffs questioned the constitutionality of Illinois statutes relating to the election of Circuit Court judges. This was deemed important enough to require a three judge panel.

Appellants again resort to their claim that plaintiff herein was an isolated voice in the wilderness, whose rights were unique and different from all other Illinois residents. This frivolous claim has been refuted elsewhere herein. To accept the position of the appellant would be to frustrate the goal of Congress and allow one federal judge to invalidate a state statute. This was not the desire of the Congress.

IV.

THE DISTRICT COURT PROPERLY RULED ON THE MATTER RATHER THAN ABSTAINING.

The appellants now contend that there should be no ruling on this matter under the doctrine of abstention even though this defense was not interposed at the trial level in the answer filed by the defendant, nor in the amended

answer (App. 23) nor in the answer to motion for Summary Judgment and Suggestions (App. 29). It is somewhat late to raise this point, but assuming *arguendo* that the Board can raise this defense at this late juncture the arguments raised are without merit.

First it is suggested that a Federal Court cannot interpret a state statute until the state courts do. Then why did Congress enact 28 U.S.C. 2281?

The doctrine of abstention is misunderstood by appellants, but is succinctly stated as follows:

> "Thus abstention is variously recognized: (1) to avoid decision of a federal of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket." *Wright, Law of Federal Courts 1970* p. 196.

Railroad Commission of Texas v. *Pullman,* 312 US 496, 61 S.Ct. 643 (1941) is the leading case discussing points 1, 3 and 4 which are difficult to separate in cases such as this. In that case the Pullman Co. sought to enjoin enforcement of a *regulation* of the Commission claiming two reasons: violation of its 14th Amendment rights and promulgation of orders beyond its authority. The Court refused to entertain the case since there was a substantial chance that dispositive ruling could be made without the necessity of reaching the Constitutional question. If the state court ruled that the Commission exceeded their authority, then the Constitutional question would never be reached.

Such is not the case here. Given the validity of the statute, it would affect the Plaintiff. The only grounds to hold it invalidate it would be as violative of the state or Federal constitution. There is no allegation that the law offends the Illinois Constitution. The only grounds sought to invalidate the statute is its antipathy to the U.S. Constitution. If the Court were to abstain they would be saying that no Federal Court should decide the issue, that 28 U.S.C. 2281 was to be ignored and the case was to go to the state court to determine the Federal question. Such is not the concept of our Judicial system.

The case of *Faherty* v. *The Board of Election Commissioners of the City of Chicago,* 5 Ill. 2d 519, 126 NE 2d 235 (1955) at first blush looks like a similar challenge to a similar law. Plaintiff voted in the April 1954 Republican Primary and wished to vote in the Democratic Primary in Chicago in February 1955 (where the present Mayor Richard J. Daley was nominated over the incumbent) and then go back to the Republican Primary in April 1956. The complaint challenged not the statute, but the defendant's interpretation which would deny their wishes. He sought a judgment declaring the statute inapplicable in cases of municipal primaries. *No Constitutional arguments were raised whatsoever.* The Court stated only at 265 NE 2d 235, 238

> "the section is intended to prevent those who voted in the primary of one political party at a state wide primary election from voting in the primary of the other political party at a municipal primary election which occurs within 23 months."

That statement is not only conceded, but is the reason the suit was brought. What the 3 judge District Court has decided and what this Court must decide is whether the

interpretation of the statute placed upon it by the Illinois Supreme Court is Constitutionally permissible. No other channel for deciding this issue is available due to 28 U.S.C. 2281. This Court must face this question. No one has said it better than Chief Justice John Marshall over 150 years ago when he said:

> It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution.
>
> . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution" *Cohens* v. *Virginia,* 6 Wheat 264, 404, 5 LE 257 (1921).

The citation of *Jackson* v. *Ogilvie,* supra as authority for abstaining is equally invalid since that case was not decided because the issues were moot. The recitation of seemingly useful dicta should not be construed as binding precedent. That case involved merely signature requirements to be placed on the ballot and didn't come before this Court until after the election.

The new wave of voting cases of the past decade challenging various state registration, primary and reapportionment laws have consistently been decided by Federal Courts. *Williams* v. *Rhodes* supra, *Rosario* v. *Rockefeller,* supra; *Gordon* v. *Executive Committee,* supra; *Bendinger* v. *Ogilvie; Lippitt* v. *Cippollone,* 357 F. Supp. 1405 (ND Ohio 1971) affd 404 US 1032, 92 S.Ct. 729 (1972).

Further the Court not only should not abstain but may not in this case since there is "no underlying issue of state law controlling [the] litigation. *McNeese* v. *Board of Education for Community Unity School District 187*, 373 U.S. 668, 674 (1963).

V.

THE STATUTE IN QUESTION WAS PROPERLY DECLARED UNCONSTITUTIONAL AS VIOLATIVE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Appellants are correct when they say that the Illinois Supreme Court in *Faherty*, supra, left open the question of the validity. However, for the reasons heretofore cited, they should not only not dissuade this Court from deciding the issue, but encourage it to do so in order that the citizens of Illinois (and other states whose citizens might be affected) must know what their rights are. Additionally, this is the first time that the constitutionality of the act has been raised.

Much has been said by the Commissioners of their regard for the party system and the need to preserve its integrity. The history of political parties in this country is well known. Our first President, George Washington, was elected without political parties or even any opposition. The party system soon evolved along the question of a strong central government. The adherents to the positive point of view—Alexander Hamilton and John Adams—became the architects of the Federalist party while Thomas Jefferson and his followers who favored less power in the national government with more left to the states and the people became the Democratic—Republicans and ultimately the Democrats.

As the Federalist party faded in the 1820's, the Whig party became the alternative to the Democrats of Andrew Jackson. During this period, there were splinter parties, but as slavery became more and more the issue in the country, the Republican Party appeared on the scene. In 1856, they mounted their Presidential campaign. Although John C. Fremont was defeated, the new party soon became the dominant one. The Republicans won the next six elections and in 68 years, lost only 4 of 18 Presidential elections.

In the 20th century, the Democratic and Republican parties became *the* parties and the two party system became entrenched. Yet in 1920, 1924 and 1948, other candidates for President received over a million votes. The 1968 election saw George Wallace, as the candidate of the American Independent Party gain over 9 million votes.

The parties and their procedures have become party of our daily lives. Pollsters divide the populous into Democrats, Republicans and Independents, noting a steady increase in the third category. All of the 535 members of Congress are either Democrats or Republicans; all of the 50 governors represent one of the two political parties. The parties' National Convention and primaries attract nationwide attention. It has been said that political parties are an integral part of our system. Although it was not written into the Constitution, it is probably true.

When the rights of one group or person conflict with another, we have a problem, often one left for the courts to decide. This is true here. The Court must balance the right of the political parties as protected by the state against the interests of the voters.

The right to vote is a sacred one. The appellee makes no attempt to attach preferential treatment for one right as against another as the appellant's brief implies. However, it is worthwhile to reflect on the preciousness of the franchise as our forefathers saw it in the Federalist papers, written to encourage ratification of the Constitution, to-wit:

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution." *Federalist 52, Brittanica Great Books* Vol. 43, P. 165.

The Courts have protected the right to vote against infringement because of color. *Smith* v. *Allwright*, supra; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960); *Hadnott* v. *Amos*, 394 U.S. 358, 89 S.Ct. 1101 (1969); or due to poverty *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966) *Harper* v. *Vance* 342 F. Supp. 136 (1972 DC Ala) or due to loss of effective vote due to malapportionment, *Reynolds* v. *Sims*, supra; *Baker* v. *Carr*, supra, *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481.

The brief of the Board cites law where the interests of political parties are given consideration. Recently, the courts have limited that power. In Pennsylvania, the equal protection clause was invoked to prevent the political parties from allowing their members who were government employees, the day off with pay on Primary Election Day. It was reasoned that to do this so they can aid candidates endorsed by the local political party "discriminated against all other political candidates and deprived them of the equal protection of the law." *White* v. *Snear*, 313 F. Supp. 1100 (1970 DC Pa).

Further, restraints on the zeal of political parties when such activity impinges on the rights of voters and candidates have been ordered by Seventh Circuit Court of Appeals and the District Court for the Northern District of Illinois where the instant case arose. In *Shakman* v. *Democratic Organization of Cook County,* 435 F.2d 267 revg 310 F.Supp 1398 and on remand 356 F.Supp 1241 (DC Ill 1973) the court held that rights of voters, candidates and taxpayers with respect to patronage practices are not merely deviations of the rights of the patronage employees. The court further ruled that forcing persons to do political and campaign work and to vote for party candidates states a cause of action with respect to constitutional rights of voters, candidates and taxpayers since this practice serves to perpetuate the dominant political party to the disadvantage of the other(s) and independents.

Further systems which tend to perpetuate one party or an incumbent against "newcomers" was likewise held an invalid exercise of power. The court ordered the Illinois Secretary of State, whose policy favored certain persons with past legislative experience, incumbents and cronies with ballot position to use a system fair to all. *Mann* v. *Powell,* 333 F.Supp 1261 (DC Ill 1971).

The states have less leeway in making classifications when "fundamental rights and liberties than in economic matters. *Harper* v. *Virginia State Board* supra. The balancing of these interests is not really difficult, because "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Konigsberg* v. *State Bar,* 366 U.S. 36, 61, 81 S.Ct. 997, 1012.

The question of compelling state interest is a difficult one. In *Williams* v. *Rhodes,* supra, the court had to decide

whether Ohio law which made it virtually impossible to place candidates of a minority party on the ballot violated the equal protection clause of the 14th Amendment. The state argued that their interest in preserving the two party system and party integrity outweighed the freedom to vote and associate through the electoral process of the plaintiffs.

The court held that such a statute so placed an unequal burden on the minority groups to overcome the state interest.

The case of *Rosario* v. *Rockefeller,* supra, is seemingly similar to the instant case, but distinguishable at a crucial point. The New York statute in question there, required voters to register 30 days prior to a general election to be eligible to vote in the next primary. This forces a declaration of party affiliation; it can lock a voter out of a particular primary. But in New York, as the court took great pains to point out the voter *can* vote by simply enrolling his name. Plaintiff *Rosario,* did not choose to do so. There are even extensions for those who became qualified after the original enrollment date, those who were too ill to enroll or those who moved within the single county.

The potential voters in the New York case cited many cases where the franchise was lost due to the operation of state law, which was subsequently invalidated as contrary to the U.S. Constitution. At 93 S.Ct 1249, the majority distinguished those cases since "in each of those uses, the state totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of the class could have made themselves eligible to vote."

That is the result of the statute complained of.

But wait say the Commissioners: She could have voted in the Republican primary.

What is the right to vote and if the voter cannot vote for the candidate of her choice? In *Williams*, the court recognized this in placing the Independent Party on the ballote by saying at 393 U.S. 23, 31:

> "So also the right to vote is heavily burdened if that vote may be cast only for one of the two parties at a time when others are clamoring for a place on the ballot."

A restricted vote is a lost vote. The Constitution can only preserve the integrity of the franchise by insuring the voter the widest possible choice among those who offer themselves for office.

The case of *Bendinger* v. *Ogilvie*, supra, was brought in the District Court of Illinois to declare another section of the Ill. Election Code invalid, Ch. 46, Sec. 8-8 (Ill. Rev. Stats. 1971) provides as a requirement for eligibility for a candidate for public office among other items that a person cannot have "requested a primary ballot of any other party at a primary election held within two years of the date on which the petition (for nomination) must be filed." The court upheld the provision saying the compelling state interest of preventing a "multitude of party swapping candidates" outweighed the right to run for office. The Court distinguished *Gordon* v. *Executive Committee*, supra, and said at page 586:

> "However, *Gordon* dealt with the restriction upon party switching placed on voters in primary elections. The instant case involves the restrictions placed upon candidates in primary elections. The state's interest in

limiting candidates from switching parties, as detailed above, is greater than its interest in preserving a vigorous and competitive two-party system and is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; *the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so.*" (italics added)

This is the true picture of what local Federal judges think the state of the Illinois Election Code is. The judicial dicta therein is ample authority for affirmance of the District Court decision herein.

The case of *Lippitt* v. *Cippolone*, supra, is almost identical with the *Bendinger* case. Lippitt had been a Republican who wished to run as a member of the American Independent Party in the face of a similar Ohio statute. The Court upheld the statute placing party integrity above the right to hold office.

The courts have always held that the right to seek or hold publice office is a privilege, not a right. *Snowden* v. *Hughes*, 312 U.S. 1, 64 S.Ct. 397, 88 L.Ed 497 affg (CCA7) 132 F.2d 476. *Peo. ex rel Graham* v. *Lindsey*, 80 Colo. 465, 253 Pac. 465; *Jeffries* v. *Election Commission*, 294 Mich. 255, 293 NW 546.

There is no question that the franchise is a right not a privilege. It will be protected against incursion even in primaries. *Brown* v. *Baskin*, 78 F.Supp 9333 (1948 D.C.).

There is much political theory in the Commissioner's brief. I will not indulge in supposition as to whether or not the District Court decision affected the 1972 Illinois primary results. That is not relevant. Citizens' rights are relevant. Nonetheless, it is incumbent upon the plaintiff to set the record straight.

Figures given by the appellant's office indicate that in 1971, 397, 818 persons voted in the Democratic primary and 41,994 in the Republican. 13 months later, with the franchise extended to 18 years and the District Court decision in force, 760,157 persons cast Democratic ballots against 88,921 persons asked for Republican ballots.

In 1971, approximately 9.5% of the voters asked for Republican ballots, whereas 90.5% voted in the Democratic primary. In 1972, nearly twice as many persons voted with approximately 10.5% of the persons voting in the Republican primary and the balance in the Democratic primary where there were hotly contested races for Governor and Cook County States Attorney. Where is the raiding? The published figures of the defendant belie their thesis.

The defense contention that Republicans contrived to elect a weaker Democratic candidate for Governor seems rather silly when the candidate carried the area of the Commissioners aegis 806,603 to 542,245 in November. It is of some historical importance to note that this "weaker" candidate is now Governor, Daniel Walker.

The contention that the Classic case merely secured the right to vote in a primary and have the government insure its accurate tabulation and nothing more is myopic. What good is the right to vote in a primary (or any election) if you cannot vote for, or against, the candidate of your choice?

The logical extension of the argument of the Commissioners that we presume that statutes are valid is to obviate 28 U.S.C. 2281.

In the case of *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404 (1969) the Court upheld the validity of the Statute which prevented jail inmates from obtaining absentee ballots. This was done not because the Court didn't wish to declare the statute unconstitutional but it was constitutional in that it only prevented absentee voting and did not bar the right to vote.

The claim that appellants received no opportunity to present facts to substantiate the "compelling interests" of the State is also fallacious. The Commissioners opportunity to file affidavits or anything else along with their answer to Motion for Summary Judgment and suggestions [App. 29].

The provision of Article I, Section 2 of the Constitution with respect to voting rights was also discussed in a case which appellant consistently tries to ignore. In *Williams* v. *Rhodes,* supra, this section was interposed by the state to try to justify and denial of the right to vote and associate to the plaintiffs—the 89 S.Ct. 10, the court said.

> "Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that "No state shall • • • deny to any person • • • the equal protection of the laws."

The question of when a person, if ever, becomes a member of a political party in Illinois is a troublesome one. Under

Illinois law the primary in which a person votes is recorded, but no list is kept by party of its members. On the National level, the Republican party has no enrollment or membership cards and only recently has the Democratic party sought to encourage membership into the payment of a fee a receipt of certain data. If this however would not foreclose an individual from voting in a Republican primary in his home state.

One of the facts of which the court must take cognizance is the fluidity of politcal change. In the past few years we have seen such prominent political figures as Senator Strom Thurmond, former Senator Wayne Morse, Governor George Wallace, Mayor John Lindsey and most recently former Governor John Connally announce publicly their changes in party allegiance. Party lines are further blurred by the endorsement of Democrats by Republicans and vice-versa. No Presidential, Gubernatorial or Senatorial campaign would be complete without a list of supporters from the opposite party.

Voter allegiance to a political party is likewise dwindling. In 1972 for the first time the voters of Illinois voted for the Presidential candidate of one party and the Gubernatorial candidate of the other, while President Nixon, Senator Charles Percy and Attorney General William Scott were piling up huge Republican majorities, the incumbent Republican governor and the Republican acting Secretary of State were defeated by their Democratic opponents.

The Court has recognized sociological changes in America with respect to election law. In 1904 the Supreme Court upheld a registration and residency requirement within a state as a valid form of qualifying as an elector. The court said:

"The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."

Pope v. *Williams,* 193 U.S. 621, 24 S. Ct. 573, 48 L. Ed. 817 (1904).

Recently, however, courts have begun to recognize the mobility of our society and have struck down residency requirements as they discriminate against college students, *Newberger* v. *Peterson;* (1972 DC NH) 344 F. Supp 559; their residency requirements in *Tennessee, Dunn* v. *Blumstein,* 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed. 2d 294 (1972); in *Massachusetts Burg* v. *Camille,* 315 F. Supp. 38 d (DC Mass) affd 405 U.S. 1034, 92 S. Ct. 1303, 31 L Ed 2d 575 (1972); In Alabama, *Hadnott* v. *Amos,* supra; in Connecticut, *Kohn* v. *Davis,* 320 F. Supp (DC Conn) affd 405 U.S. 1034, 92 S. Ct. 1305, 31 L Ed 2d 576 (1972); Minnesota, *Keppel* v. *Donovan,* 326 F. Supp 15 (DC Minn) affd 405 U.S. 1034, 92 S. Ct. 1304, 31 L Ed 2d 576 (1972); and in North Carolina, *Andrew* v. *Cody,* 327 F. Supp. 793 (DC NC) affd 405 U.S. 1034, 92 S. Ct. 1306, 31 L. Ed 2d 576 (1972) and in Mississippi *Ferguson* v. *Williams,* 1972 (DC Miss) 343 F. Supp. 654.

Likewise the court must recognize that people change their feelings about candidates and parties. In 1960 Richard Nixon was defeated for a president while in 1972 he was elected with the assent of the voters in 49 of the 50 states. In 1964 the Republican Party got less than 40% of the national vote but 8 years later it received approximately 60% of the vote.

No primary law requires a person to vote in the final election for a candidate whom he voted for in a primary. To do so would be outlandish. To lock a person into the primary of one party and prevent him from casting an effective vote is equally outlandish. That is why courts across the country have struck down similar state statutes in New Jersey, *Nagler* v. *Stiles* (1972 DC N.J.) 343 F Supp 415; in Rhode Island, *Yale* v. *Curvin,* (1972) DC R.I.) 345 F. Supp. 447 and in South Carolina, *Gordon* v. *Executive Committee,* supra. That is why this court must affirm the striking down of Chapter 46, Sec. 7-43d of the Illinois Revised Statutes (1971) as an unconstitutional denial of equal protection of the laws.

CONCLUSION

The Court must affirm the district court decision and hold Ch. 46, Sec. 7-43d unconstitutional. To do otherwise would ignore the collective wisdom of district courts in different areas of the country and would ignore the 14th Amendment of the Constitution and greatly limit the franchise.

Respectfully submitted,

RAY JEFFREY COHEN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court Of The Northern District Of Illinois

REPLY BRIEF FOR APPELLANTS

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In The

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STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

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HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court Of The Northern District Of Illinois

REPLY BRIEF FOR APPELLANTS

STATEMENT OF FACTS.

Contrary to the Statement of the Case of plaintiff the issues in this case and *Klaetsch and Lombardo* v. *Stern*, No. 71 C 2415, U.S.D.C. N.D. Ill., are not identical. Though the three plaintiffs attacked the constitutionality of the provisions of the same state statutes, the issues raised by the pleadings are different, and the pleadings in *Pontikes*, the only case here on appeal, are too seriously deficient to support the decision of the district court. Furthermore, the three-judge district court never entered an order consolidating these cases, but only chose to hear argument and render the decisions in the cases at the same time. This attempt by the three-judge court to save time here may well have caused more problems since the court failed to recognize the differences in the two cases. Both of the cases were simply attacks by individuals who wished to act in a fashion which, they believed, the Illinois Election Code prohibited.

ARGUMENT.

INTRODUCTION.

Plaintiff's answer to defendants' brief in essence rests on three basic premises; first, the district court properly took jurisdiction in this case because the federal courts and three-judge district courts have taken jurisdiction of other voting cases; second, that the political party is no longer useful to the American system of government; third, that election by plurality is desirable. These premises are simplistic and ignore the requirements of pleading jurisdiction and a claim upon which relief can be granted and the reservation of power in the states by the Constitution. There are no cases decided by this court over the past decades which warrant the assumption of any of those premises.

I.

THE JURISDICTION OF THE THREE-JUDGE DISTRICT COURT.

Sections I, II and III of appellee's brief address themselves essentially to the question of the jurisdiction of the three-judge district court to hear and decide this case. The plaintiff's position is simply that she wished to vote in the Democratic Party Primary on March 21, 1972, Section 7-43(d) of the Illinois Election Code prohibited her participation in that Primary, this is an election case thus vesting jurisdiction in the district court, therefore, that court properly decided the case. This sophomoric position ignores the legal principles enunciated in the cases cited by appellants in Sections I, II and III of their brief.

Plaintiff's exercise in distinguishing the facts of the cases cited as authority by the defendants does not eliminate their value as guides containing statements of legal principles which stand unchallenged. *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965); and *Poe* v. *Ullman*, 367 U.S. 497, 81 S.Ct. 1752 (1961) are apt examples of a principle being announced in one case and being applied in another. The principle announced in *Poe* v. *Ullman*, supra, that the court would not decide cases not having parties who had some present antagonistic positions so that one party was immediately threatened by the other, found that in *Griswold* v. *Connecticut*, supra, the same question was raised where Griswold faced a deprivation of rights protected by the Federal Constitution. In the case at bar, the plaintiff could have made the requisite affidavit under Ill. Rev. Stats. (1971) Ch. 46, §7-45 which is based on the §7-43(d) requirements and voted and made the constitutional defense if she were prosecuted. If the plaintiff construed §7-43(d) as only limiting participation in the Municipal Primary, no federal constitutional question would arise in a criminal prosecution if the Illinois courts accept her construction. This we submit is the teaching of *Poe* v. *Ullman*, supra, and *Griswold* v. *Connecticut*, supra. Thus the "ripeness" that plaintiff finds so appealing in *Griswold* was available to her in this case, but she instead chose the oblique approach rejected in *Poe* rather than meeting the issue head on.

Lawsuits by three voters from two counties out of 102 counties in Illinois and a number of cities which have chosen to have their elections governed by a Board of Election Commissioners, Ill. Rev. Stats. (1971) Ch. 46,

§§ 6-15 - 6-26, and 5-1, hardly raise any reasonable presumption of the facts necessary to satisfy the requirements of Federal Rules of Civil Procedure 23. Klaetsch, Lombardo and Pontikes are hardly so numerous that joinder was impracticable. Only the rights of the individual litigants could have been determined on the pleadings before the district court.

Plaintiff does not dispute the proposition for which *Pan American Petro Corp.* v. *Superior Court of Delaware,* 366 U.S. 656, 81 S.Ct. 1303 (1967); *Gully* v. *First National Bank in Meridian,* 299 U.S. 109, 57 S.Ct. 96 (1936); and *McNutt* v. *General Motors Acceptance Corporation of Indiana, Inc.,* 298 U.S. 178, 56 S.Ct. 780 (1936) are cited. Apparently plaintiff concedes the necessity for the formal assertion of jurisdiction. Plaintiff's quotation from the *Gully* case, supra, at page 9 of her brief, is one of the tests set out by Mr. Justice Cordozo to determine how and when a case arises under the constitution or laws of the United States. The quotation and the argument of the plaintiff following is unwarranted by the whole of the decision.

Apparently plaintiff sees the United States Constitution as governing in every facet of life in these United States. She ignores, and would also have this Court ignore, the Ninth and Tenth Amendments reserving to the people and to the states powers not granted to the Federal Government or prohibited by the Constitution to the States.

Only some of the voters residing within the geographical jurisdiction of the Board of Election Commissioners of the City of Chicago can claim that their ability to vote in any party primary is affected by §7-43(d). The Demo-

cratic and Republican parties do not slate candidates for municipal offices in Berwyn, Stickney or Lyons. Apparently, plaintiff is not aware of the existence of Ill. Rev. Stat. (1971) Ch. 46, §6-1 et seq. which provides for Board of Election Commissioners. So. the comments of the plaintiff at pages 13-15 of plaintiff's brief are necessarily colored by the *fact* that only a part of Cook County is involved and indeed only a part of the area within the jurisdiction of the Board. The role of the Board of Election Commissioners or the County Clerk will vary from one area under its or his jurisdiction to another depending on whether an established political party participates in the municipal officers primary. It is this fact which must be considered along with other relevant tests in determining whether a matter is a local matter not within the jurisdiction of a three-judge court, rather than merely deciding that election laws are involved in the litigation.

II.

THE DISTRICT COURT SHOULD NOT HAVE DECIDED THE CONSTITUTIONAL ISSUE.

Plaintiff's quotation at page 16 of her brief, from Professor Wright's *Law of Federal Courts* is a summary of practically the whole of part IV of defendant's brief. Without doubt, the plaintiff does not understand the doctrine of abstention. Repugnance to a state constitution is not the question. To determine whether the doctrine of abstention applies, the question is whether a state appellate court will construe the statute in question in a fashion that eliminates the need for consideration of the question of whether the statute is repugnant to the Federal Constitution.

Plaintiff, at pages 17 and 18 of her brief, erroneously suggests that the decision of the Illinois Supreme Court in *Faherty* v. *Board of Election Commissioners of the City of Chicago,* 5 Ill.2d 519, 126 N.E.2d 235, (1955) is an issue in the case at bar. The decision in *Faherty* that participation in a statewide primary precludes change of political party in the municipal officers primary is not the same as the question of whether participation in the city primary precludes change in the statewide primary. The latter is a question of how the state statute is to be construed, and we submit that a construction which permits change in the statewide primary participation should have been adopted by the district court in the light of existing authority that state statutes should be construed so as to be constitutional rather than adopting a construction which results in the state statute being declared unconstitutional.

Notwithstanding our views of the proper role of district courts in construing state statutes, the concurring opinion of Mr. Justice Douglas in *Jackson* v. *Ogilvie,* 401 U.S. 904, 91 S.Ct. 642 (1971) is particularly apposite here. *McNeese* v. *Board of Education for Community Unit School District 187, Cahokia, Ill., et al.,* 373 U.S. 668, 83 S. Ct. 1433 (1963) involved a claim of denial of rights guaranteed by the Fourteenth Amendment. The question raised was whether state administrative remedies must be exhausted before seeking relief in the federal courts. No question of statutory construction was involved. Unlike *McNeese,* supra, statutory construction may eliminate from this case the constitutional question.

In addition, Ill. Rev. Stats. (1971) Ch. 110, §57.1 provides for a declaratory judgment and immediate hearing

of the action. The Illinois Supreme Court has decided that election questions are proper subjects for a declaratory judgment action in *Progressive Party* v. *Flynn*, 400 Ill. 102, 79 N.E.2d 516 (1948). Thus a definitive construction of the statute involved in the case at bar was readily available.

III.

THE DECISION ON THE CONSTITUTIONALITY OF §7-43(d) WAS IN ERROR.

Defendants have never said that "*Faherty*, supra, left open the question of the validity" of anything. It is true that the question of the constitutional validity of §7-43(d) has not been decided heretofore. Defendants have suggested that *Faherty* "leaves open" the construction of §7-43(d) under the circumstances in this case in that §7-43(d) may be construed so as to avoid any constitutional question.

The premise of plaintiff's argument that §7-43(d) is unconstitutional is that the integrity and importance of political parties in the American system of government is dwindling. Plaintiff cites no case law for this proposition, but freely narrates her ideas of political history with few, if any, citations to authority. In addition, plaintiff postulates an absolute right to vote under all circumstances. The issue over which plaintiff and defendant differ is not one, however, of the denial of the right to vote, as plaintiff would have this Court believe. Rather it is whether a state may regulate participation in political party primaries so that a political party will in fact represent some particular political and social views. There is no issue of anyone being excluded from the nomination process or the election of government officials.

Contrary to plaintiff's analysis of *Rosario* v. *Rockefeller*, ... U.S. ....., 93 S.Ct. 1245 (1973), defendants submit that that case is indicative of this Court's continued recognition of the importance of the political party in our system of government and the allowance of some protection of them by the states.

Plaintiff would equate the vote in a political party primary with the vote in the general election. That equation distorts the fact. The political party primary is for the benefit of a particular group of people who join together because they believe that they agree that similar principles of government and society are important, and are seeking to select a candidate to represent their views in the general election. Necessarily the primary is an election for people of like political persuasion. Plaintiff approves the district court's decision in *Bendinger* v. *Ogilvie*, 355 F. Supp. 572 (N.D. Ill. 1971), which upheld the Illinois restriction that to be a candidate in a political party primary a person must not have voted in the opposite party primary in the past two years. Ill. Rev. Stat. (1971) Ch. 46, §8-8. Plaintiff's "open primary" argument in this case would make *Bendinger* meaningless because it would be impossible for a prospective candidate or candidate to identify his constituency. The result would be that a primary would be useless in selecting a candidate representing the views of the party and political parties would have no value since they would not be composed of persons who adhere to a similar political and social ideology.

Plaintiff's treatment of *Lippitt* v. *Cipollone*, 357 F. Supp. 1405 (N.D. Ohio 1971), aff'd. 404 U.S. 1032, 92 S. Ct. 729 (1972) is inaccurate. Actually eight sections of the

Ohio Rev. Code were involved in that case. We point out at page 44 of our brief the similarity of one section of the Ohio Rev. Code to section 7-43(d) which was upheld by this Court.

The figures cited by plaintiff at page 26 of her brief concerning the vote cast in the 1971 and 1972 party primaries are not a part of the record in this case. The raw figures, even if accurate, cannot set out changes, if any, in voting patterns. It is significant that while Daniel Walker was elected Governor of Illinois and allegedly carried the area under the aegis of the defendants by over 250,000 votes, the Democratic Party Candidate for State's Attorney lost. The effect of the decision in the case at bar on those elections can only be learned by an analysis of the primary vote. Untested opinions have little, if any, value.

The court's zeal in finding §7-43(d) unconstitutional is in the face of the fact that the court could have granted plaintiff relief without holding the statute unconstitutional. The court could have interpreted §7-43(d) in the manner heretofore suggested, i.e., finding it did not apply where the vote was in the municipal major party primary prior to the statewide primary. This would have satisfied the presumption of constitutionality which all statutes have, and allowed the equal treatment of Chicago citizens with citizens in towns where municipal elections do not include major party candidates.

The conflict between plaintiff and defendants over the constitutionality of §7-43(d) resolves itself into two basic questions: Will this Court overthrow its demonstrated adherence to the jurisprudence developed over almost 200

years and regarding the issues in this case; Will this Court maintain the limits on the federal government including the federal judiciary in encroaching on the right of the states to regulate their affairs, including elections, as preserved and limited by the United States Constitution?

CONCLUSION.

We have demonstrated in our brief and this reply that there is no sound basis for the decision and judgment of the district court.

We respectfully urge this Court to reverse the decision of the district court.

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KUSPER ET AL. *v.* PONTIKES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 71–1631. Argued October 9, 1973—Decided November 19, 1973

Appellee, a qualified Chicago voter who voted in a February 1971 Republican primary involving nominations for municipal officers, challenges the constitutionality of § 7–43 (d) of the Illinois Election Code, under which she was barred from voting in a March 1972 Democratic primary. Section 7–43 (d) prohibits a person from voting in the primary election of a political party if he has voted in the primary of any other party within the preceding 23 months, an exception being made if the primary is of a "political party within a city . . . only." Appellants contended, *inter alia*, that the three-judge District Court, which held the statute invalid, should have abstained because the state courts might have found the statutory exception applicable to the 1971 primary. *Held:*

1. The District Court did not err in declining to abstain from making a constitutional ruling in view of an Illinois Supreme Court adjudication confining the statutory exception to political parties entitled to nominate *only* for city offices and making it inapplicable to the Democratic and Republican parties. Appellee is thus not relieved of the bar of the 23-months' rule. Pp. 2–6.

2. Section 7–43 (d) unconstitutionally infringes upon the right of free political association protected by the First and Fourteenth Amendments by "locking" the voter in his pre-existing party affiliation for a substantial period of time following his participation in any primary election, and the State's legitimate interest in preventing party "raiding" cannot justify the substantial restraint of the 23-months' rule. *Rosario* v. *Rockefeller*, 410 U. S. 752, distinguished. Pp. 6–10.

345 F. Supp. 1104, affirmed.

Syllabus

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., concurred in the result. BLACKMUN, J., filed a dissenting opinion. REHNQUIST, J., filed a dissenting opinion, in which BLACKMUN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–1631

Stanley T. Kusper, Jr., et al., Appellants, *v.* Harriet G. Pontikes.	On Appeal from the United States District Court for the Northern District of Illinois.

[November 19, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

Under § 7–43 (d) of the Illinois Election Code, a person is prohibited from voting in the primary election of a political party if he has voted in the primary of any other party within the preceding 23 months.[1] Appellee Harriet G. Pontikes is a qualified Chicago voter

[1] Ill. Rev. Stat., c. 46, § 7–43 provides, in pertinent part:

"No person shall be entitled to vote at a primary:

. . . . . .

"(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary which, under the provisions of Section 7–2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations for candidates for city, village or incorporated town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7–2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held."

who voted in a Republican primary in February of 1971;[2] she wanted to vote in a March 1972 Democratic primary, but was barred from doing so by this "twenty-three months rule."[3] She filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Illinois, alleging that § 7–43 (d) unconstitutionally abridged her freedom to associate with the political party of her choice by depriving her of the opportunity to vote in the Democratic primary. A statutory three-judge court was convened,[4] and held, one judge dissenting, that the 23-months rule is unconstitutional. 345 F. Supp. 1104.[5] We noted probable jurisdiction of this appeal from that judgment. 411 U. S. 915.[6]

I

At the outset, we are met by the appellants'[7] argument that the District Court should have abstained from

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[2] The Republican primary in which the appellee voted involved nominations for the offices of Mayor, City Clerk, and City Treasurer of Chicago.

[3] The March 1972 Democratic primary involved, *inter alia*, nominations for Governor, United States Senator, United States Representative, state legislators, county officers, and delegates to the National Convention of the Democratic Party.

[4] 28 U. S. C. §§ 2281, 2284 (1970).

[5] The District Court upheld the constitutional validity of Ill. Rev. Stat., c. 46, §§ 7–43 (a) and 7–44, which require a declaration of party affiliation as a prerequisite to voting in a primary election. This holding, which was unanimous, has not been appealed.

[6] This case was consolidated in the District Court with a similar action brought by two other voters against the county clerk of Lake County, Illinois. The defendant in that case has not appealed from the District Court's judgment.

[7] The appellants in this case are members of the Chicago Board of Election Commissioners, who are responsible for administering the provisions of the Illinois Election Code within the city. See Ill. Rev. Stat., c. 46, § 6–21 *et seq.*

adjudicating the constitutionality of the 23-months rule. They base this argument upon that portion of § 7–43 (d) which provides that

> "[P]articipation by a primary elector in a primary of a political party which, under the provisions of Section 7–2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party . . . ."

The appellants note that the February 1971 Republican primary election in which Mrs. Pontikes voted involved only nominations for the offices of Mayor, City Clerk, and City Treasurer of the city of Chicago. They claim that the state courts might interpret this 1971 primary to have been one of a "political party within a city . . . only," and thus outside the purview of the 23-months rule.

As we stated in *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509:

> "Abstention is a 'judge-made doctrine . . . , first fashioned in 1941 in *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, [that] sanctions . . . escape [from immediate decision] only in narrowly limited "special circumstances," *Propper* v. *Clark*, 337 U. S. 472, 492,' *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967), justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' *England* v. *Medical Examiners*, 375 U. S. 411, 418 (1964)." [8]

[8] Bracketed material in original.

The paradigm of the "special circumstances" that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. *Zwickler* v. *Koota*, 389 U. S. 241, 249; *Harrison* v. *NAACP*, 360 U. S. 167, 176–177. Abstention in such circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication. *Harman* v. *Forssenius*, 380 U. S. 528, 534. But the doctrine of abstention "contemplates that deference to state court adjudication only be made when the issue of state law is uncertain." *Ibid.* Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to "guard, enforce, and protect every right granted or secured by the Constitution of the United States," *Robb* v. *Connolly*, 111 U. S. 624, 637.

We think that the Illinois statute involved in this case is not fairly susceptible of a reading that would avoid the necessity of constitutional adjudication. The appellants' argument—that the February 1971 Chicago Republican primary might be considered that of a "political party within a city . . . only"—is foreclosed by the decision of the Illinois Supreme Court in *Faherty* v. *Board of Election Comm'nrs*, 5 Ill. 2d 519, 126 N. E. 2d 235. That decision made it clear that the kind of "local" primaries that are outside the scope of § 7–43 (d) are simply those of "purely city . . . political part[ies]"—those parties entitled, under § 7–2 of the Illinois Election

Code, to make nominations for city offices *only*. 5 Ill. 2d, at 524; 126 N. E. 2d, at 238.[9]

Since both the Democratic and Republican parties are, of course, entitled in Illinois to make nominations not only for city offices, but for congressional, state, and county offices as well, the *Faherty* court held that they were not within the statutory definition of "city" parties. It follows then, that despite the fact that the February 1971 Republican primary in which the appellee voted involved only nominations for offices within the city of Chicago, Mrs. Pontikes was still clearly barred by the 23-months rule from voting in the March 1972 Democratic primary.[10] The District Court was thus wholly justified

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[9] Ill. Rev. Stat., c. 46, § 7–2 defines the term "political party" under Illinois law, and states the offices for which various types of political parties are entitled to make nominations. Under § 7–2, a party that garners more than 5% of the entire vote cast at a statewide general election is defined as a "political party within the State," and is entitled to make nominations for all state and county offices in the next succeeding primary. Similarly, a party that polls more than 5% of the entire vote cast at a municipal general election is defined as a "political party within . . . [a] city," and is entitled to make nominations for city elective positions at the next succeeding primary.

Under § 7–43 (d), a "political party within a city . . . only" is one that has qualified under § 7–2 to make only city nominations; in other words, a party that has polled more than 5% of the vote at the preceding municipal general election, but less than 5% of the vote at the preceding statewide general election. Obviously, the Republican party, in whose 1971 Chicago primary the appellee voted, does not fit within this description.

[10] It is true, as the appellants argue, that the plaintiff in *Faherty* wished to vote in a Chicago Democratic primary after having voted, within the past year, in a statewide Republican primary; thus, the factual setting in *Faherty* was precisely the converse of that here. This, however, is a distinction without a difference. The holding of *Faherty* was that Republican and Democratic primaries, even those involving only citywide offices, were not primaries of political parties

in declining to abstain from deciding the constitutional validity of the 23-months rule, and it is to that issue that we now turn.

II

There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. *NAACP* v. *Button*, 371 U. S. 415, 430; *Bates* v. *Little Rock*, 361 U. S. 516, 522–523; *NAACP* v. *Alabama*, 357 U. S. 449, 460–461. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. *Williams* v. *Rhodes*, 393 U. S. 23, 30. Cf. *United States* v. *Robel*, 389 U. S. 258.

To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States.[11] But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections. See, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330; *Kramer* v. *Union School District*, 395 U. S. 621; *Carrington* v. *Rash*, 380 U. S. 89. As the Court made clear in *Williams* v. *Rhodes*, *supra*, unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments. 393 U. S., at 30. And see *id.*, at 35 41 (DOUGLAS, J., concurring); *id.*, at 41–48 (Harlan, J., concurring).

There can be little doubt that § 7–43 (d) substantially restricts an Illinois voter's freedom to change his political party affiliation. One who wishes to change his party

"within a city . . . only." See n. 9 *supra*. Thus, these primaries are fully within the purview of the § 7–43 (d) 23-months rule.

[11] See Art. I, § 2; Art. II, § 1. With respect to elections to federal office, however, the Court has held that Congress has power to establish voter qualifications. *Oregon* v. *Mitchell*, 400 U. S. 112.

registration must wait almost two years before his choice will be given effect. Moreover, he is forced to forego participation in any primary elections occurring within the statutory 23-month hiatus. The effect of the Illinois statute is thus to "lock" the voter into his preexisting party affiliation for a substantial period of time following participation in any primary election, and each succeeding primary vote extends this period of confinement.

The 23-months rules does not, of course, deprive those in the appellee's position of all opportunities to associate with the political party of their choice. But neither did the state attempts to compel disclosure of NAACP membership lists in *Bates* v. *Little Rock* and *NAACP* v. *Alabama* work a total restriction upon the freedom of the organization's members to associate with each other. Rather, the Court found in those cases that the statutes under attack constituted a "substantial restraint" [12] and a "significant interference" [13] with the exercise of the constitutionally protected right of free association.

The same is true of § 7–43 (d). While the Illinois statute did not absolutely preclude Mrs. Pontikes from associating with the Democratic party, it did absolutely preclude her from voting in that party's 1972 primary election. Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process. By preventing the appellee from participating at all in Democratic primary elections during the statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.

[12] *NAACP* v. *Alabama*, 357 U. S., at 462.
[13] *Bates* v. *Little Rock*, 361 U. S., at 523.

III

As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. *Bates* v. *Little Rock*, 361 U. S., at 524; *NAACP* v. *Alabama*, 357 U. S., at 463. For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn* v. *Blumstein*, 405 U. S., at 343. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S., at 438. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Shelton* v. *Tucker*, 364 U. S. 479, 488.

The appellants here urge that the 23-months rule serves the purpose of preventing "raiding"—the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results. It is said that our decision in *Rosario* v. *Rockefeller*, 410 U. S. 752, recognized the state interest in inhibiting "raiding," and upheld the constitutional validity of legislation restricting a voter's freedom to change parties, enacted as a means of serving that interest.

It is true, of course, that the Court found no constitutional infirmity in the New York delayed-enrollment statute [14] under review in *Rosario*. That law required a voter to enroll in the party of his choice at least 30 days before a general election in order to be eligible to vote in the next party primary, and thus prevented a change in party affiliation during the approximately 11 months between the deadline and the primary elec-

[14] N. Y. Election Law § 186.

tion.[15] It is also true that the Court recognized in *Rosario* that a State may have a legitimate interest in seeking to curtail "raiding," since that practice may affect the integrity of the electoral process. 410 U. S., at 761. But it does not follow from *Rosario* that the Illinois statutory procedures also pass muster under the Fourteenth Amendment, for the Illinois Election Code differs from the New York delayed-enrollment law in a number of important respects.

The New York statute at issue in *Rosario* did not prevent voters from participating in the party primary of their choice; it merely imposed a time limit on enrollment. Under the New York law, a person who wanted to vote in a different party primary every year was not precluded from doing so; he had only to meet the requirement of declaring his party allegiance 30 days before the preceding general election. The New York law did not have the consequence of "locking" a voter into an unwanted party affiliation from one election to the next; any such confinement was merely the result of the elector's voluntary failure to take timely measures to enroll. *Id.*, at 757–759. The Court therefore concluded that the New York delayed-enrollment law did not prevent voters "from associating with the political party of their choice." *Id.*, at 762. And see *id.*, at 758 and n. 8.

The basic difference in the Illinois law is obvious. Since the appellee here voted in the 1971 Republican primary, the state law absolutely precluded her from participating in the 1972 Democratic primary. Unlike the petitioners in *Rosario*, whose disenfranchisement was caused by their own failure to take timely measures

[15] New York presidential primaries are held in June; thus, in presidential election years, the cutoff date prescribed by § 186 occurs about eight months before the primary. 410 U. S., at 760.

to enroll, there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary.[16] The Illinois law, unlike that of New York, thus "locks" voters into a preexisting party affiliation from one primary to the next, and the only way to break the "lock" is to forego voting in *any* primary for a period of almost two years.

In other words, while the Court held in *Rosario* that the New York delayed-enrollment scheme did not prevent voters from exercising their constitutional freedom to associate with the political party of their choice, the Illinois 23-months rule clearly does just that. It follows that the legitimate interest of Illinois in preventing "raiding" cannot justify the device it has chosen to effect its goal. For that device conspicuously infringes upon basic constitutional liberty. Far from supporting the validity of the Illinois legislation, the Court's decision in *Rosario* suggests that the asserted state interest can be attained by "less drastic means," which do not unnecessarily burden the exercise of constitutionally protected activity.

We conclude, therefore, that § 7–43 (d) of the Illinois Election Code unconstitutionally infringes upon the right of free political association protected by the First and Fourteenth Amendments. The judgment of the District Court is accordingly

Affirmed.

THE CHIEF JUSTICE concurs in the result.

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[16] She could, of course, have made herself eligible to vote in the 1972 Democratic primary by foregoing participation in the 1971 Republican primary. But such a course would have prevented her from associating with the party of her choice in 1971, and thus in no way would have obviated the constitutional deficiencies inherent in the Illinois law.

SUPREME COURT OF THE UNITED STATES

No. 71–1631

Stanley T. Kusper, Jr., et al., Appellants, v. Harriet G. Pontikes. | On Appeal from the United States District Court for the Northern District of Illinois.

[November 19, 1973]

MR. JUSTICE BLACKMUN, dissenting.

The deprivation Mrs. Pontikes claims to have suffered, and which the Court today enshrouds with the mantle of unconstitutionality, is that she has been restrained by the Illinois statute from voting in *one* primary election of *one* party in the relatively minor context of a personal desire to undo an established party affiliation. Apart from this meager restraint, appellee Pontikes is fully free to associate with the party of her varying choice. She is, and has been, completely free to vote as she chooses in any general election. And she was free to vote in the primary of the party with which she had affiliated and voted in the preceding primary.

It is important, I think—and deserving of repeated emphasis—to note that this very limited statutory restriction on the appellee's exercise of her franchise is triggered solely by her personal and voluntary decision. This being so, the Court's conclusion seems to me to dilute an important First Amendment concept the vitality of which, in the long run, necessarily will suffer from strained and artificial applications of this kind. The mere fact that a state statute lightly brushes upon the right to vote and the right of association, important as these are, should not automatically result in invalidation. Prior case law does not require a conclusion of invalidity

where, as here, the intrusion is so minor. See *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802 (1969); *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973).

In nearly all the voting cases relied upon by the Court and by the appellee, the Court was faced with situations where the disqualification amounted to a direct disenfranchisement or a vote dilution suffered by a discrete class whose impediment, as so imposed, was the result of an involuntary condition not directly tied to the franchise. See, for example, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966) (poll tax and wealth); *Reynolds* v. *Sims*, 377 U. S. 533 (1963) (location); *Cipriano* v. *City of Houma* (1969) (property ownership); *Carrington* v. *Rash*, 380 U. S. 89 (1965) (military status). Cf. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972) (residence). In each of these cases there was a direct impairment of the ability of the affected class, without voluntary action, to participate in the electoral process. The level of intrusion was markedly significant.

What is before us here is a fairly complex statutory structure designed by Illinois to protect the integrity of the ballot box and the party system. The interest asserted by the State is clearly a legitimate one. *Rosario* v. *Rockefeller, supra*, 410 U. S., at 761; *Dunn* v. *Blumstein, supra*, 405 U. S., at 345; *Bullock* v. *Carter*, 405 U. S. 134, 145 (1972). And, it seems to me, means of the kind Illinois has employed are reasonably related to the fulfillment of that interest. The extent to which organized party raiding can disrupt, with unfortunate results, the orderly process of party primary balloting is, perhaps, open to reasonable differences of opinion. Indeed, in this case the parties have joined issue as to the precise degree of impact this practice has had in recent Illinois elections. Regardless of which factual version is to be credited, the legitimacy of the interest is

unquestioned. With respect to a State like Illinois, where party regimentation on an extensive scale is legendary, the Court, in my view, should move cautiously when it is tempted to pass judgment in terms of assuming that there is a better or a less drastic means by which the State is able to achieve its admittedly laudable and lawful purpose.

By resorting to a standard of rigid and strict review, and by indulging in what I fear is a departure from the appropriately deferential approach in *Rosario*, the Court places itself in the position of failing to give the States the elbow room they deserve and must possess if they are to formulate solutions for the many and particular problems confronting them that are associated with the preservation of the integrity of the franchise. Cf. *Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970); *Burns* v. *Fortson*, 410 U. S. 686, 687 (1973) (concurring opinion). Surely, at some point, the important interest of the State in protecting its entire electoral system outweighs a minor and incidental burden that happens to fall on a few uniquely situated citizens.

The Illinois Legislature has determined that a rule precluding voting in the primaries of different parties in successive annual elections is a desirable and necessary means by which to preserve an otherwise vulnerable structure. In *Rosario, supra*, 410 U. S., at 762, we applied a "particularized legitimate purpose" standard to a similarly directed scheme and upheld the New York statute. As MR. JUSTICE REHNQUIST points out in his dissent, *infra*, the degree of disenfranchisement resulting from the New York provision is potentially as great, if not greater, than the Illinois provision challenged here. That case and this one, taken together, therefore, effect incongruous results. Not only is the actual disenfranchisement in this case no greater than that in *Rosario*.

but the Illinois provision has a more rational relation to its purpose than does the New York provision. The New York statute specified an arbitrary time period prior to which it is assumed that organized party switching for raiding purposes will not occur. In contrast, Illinois chose not to employ a flat time limit that is by nature speculative and arbitrary; instead, it tied its disqualification directly to a significant event, namely, a vote in another party's last primary. Seemingly, the 23-month period was chosen so that the limitation would not extend back beyond the most recent primary. When primaries are held annually, the 23-month period amounts to no more than a one-year limitation, and in this respect the statute is drawn as narrowly as can be expected for a system that is tied to a prior primary vote rather than a designated time period. By tying the cutoff to a primary, the Illinois scheme seems directly designed to succeed in preventing organized crossovers, for it is highly unlikely that any significant number of party regulars would ever be instructed not to vote at all in one primary in order to subvert the next one that will not be held for another year.

MR. JUSTICE REHNQUIST also observes that the Illinois system does have the side effect of creating a *per se* exclusion for a few voters. It is this factor, apparently, that has caused the Court to seek to distinguish *Rosario*. In New York the disqualification occasioned by the time limit will have its impact, more often than not, upon those who have not been diligent. This, indeed, was the very situation in *Rosario*. The Illinois provision, on the other hand, affects only party switchers. And they clearly are the group most amenable to organized raiding. I do not agree that any marginal difference that may exist between the New York rule and the Illinois rule must have the effect of transforming a "legitimate

time limitation," *Rosario, supra,* 410 U. S., at 762, into an unconstitutional denial of freedom of association. This incongruity underscores what I believe to be the potential mischief that results from an easy and all-too-ready resort to a strict scrutiny standard in election cases of this kind. To be sure, the line between constitutionality and unconstitutionality must be drawn somewhere. But I would not draw it short of what Illinois has done here.

SUPREME COURT OF THE UNITED STATES

No. 71–1631

Stanley T. Kusper, Jr., et al., Appellants, *v.* Harriet G. Pontikes.	On Appeal from the United States District Court for the Northern District of Illinois.

[November 19, 1973]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court decides that the Illinois rule disqualifying a person from voting in the primary of one political party if he has voted in the primary of another political party during the preceding 23 months imposes an impermissible burden on Illinois voters' exercise of their right of free political association. In so doing it distinguishes *Rosario* v. *Rockefeller*, 410 U. S. 752, decided last Term. I find *Rosario* more difficult to distinguish than does the Court.

Section 7–43 of the Illinois Election Code provides that every person eligible to register to vote is entitled to vote at primary elections; it goes on to set out a number of exceptions to that general entitlement, including both persons disqualified under the 23-month rule challenged in this case and persons disqualified because they refuse to declare a party affiliation.[1] Section 7–44 re-

[1] Ill. Rev. Stat., c. 46, § 7–43, provides:

"Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years, shall be entitled to vote at such primary.

"The following regulations shall be applicable to primaries:

"No person shall be entitled to vote at a primary:

[*Footnote 1 is continued on p. 2*]

quires a primary voter to declare his party affiliation to the primary judges at the polling place; it further provides that, if challenged, the voter must establish his right to vote.[2] Section 7–45 requires a challenged voter

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"(a) Unless he declares his party affiliations as required by this Article;

"(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

"(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

"(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7–2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7–2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held.

"(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by Article 6 of this Act shall be entitled to vote at such primary.

"(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Article 4, 5 or 6 of this Act, when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held.

[2] Ill. Rev. Stat., c. 46, § 7–44 provides: "Any person desiring to vote at a primary shall state his name, residence and party affili-

to supply an affidavit, in a statutorily prescribed form, to establish that he is entitled to vote under § 7–43. The affidavit states, *inter alia*, that the affiant has not voted in the primary of any other political party within the forbidden 23-month period.

The Illinois system of primary elections, unlike the New York system before the Court in *Rosario*, does not require a voter to have enrolled as a member of a party months in advance in order to be eligible to vote in that party's primary. Illinois provides instead for a declaration of party affiliation at the primary polling place. And Illinois, not surprisingly in view of its different primary system, has chosen a different way to protect its interest in preventing "raiding" than has New York. It is true, as the Court makes clear, that the Illinois rule requires a voter affiliated with one party to sit out primaries during a period of 23 months in order to effectuate a switch in affiliation to another party and qualify to vote in its primaries. In this respect Illinois' rule imposes a greater burden on its voters' associational freedom than does New York's, since in New York a sufficiently prescient and diligent voter can vote in a

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ation to the primary judges, one of whom shall thereupon announce the same in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. When Article 4, 5 or 6 is applicable the Certificate of Registered Voter therein prescribed shall be made and signed and the official poll record shall be made. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one, primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his rights to vote as herein provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary."

different party's primary every year. Of course, it cannot be said whether the Illinois petitioners here underwent their change in party loyalty in time, and would have taken the necessary steps to enroll, had Illinois had New York's rule.

On the other hand, Illinois' rule imposes a lesser burden on its previously unaffiliated voters than does New York's. Indeed, it imposes a lesser burden on any voter who has, for whatever reason, failed to vote in the primary of another party within the past 23 months. Such voters are not required to foresee their interest in the primary by eight or more months, as are New York voters under the rule upheld in *Rosario*. As a practical matter, a voter is not required to swear that he has not participated in the primary of another party as a condition of his right to vote, but only if he is challenged. In these respects the Illinois rule is more closely tailored to the State's interest in preventing "raiding" than is the New York rule. Voters who have recently demonstrated loyalty to another party by voting in its primary, are more likely than those who have not to engage in "raiding." Moreover, challenges for violations of the 23-month rule are not likely to be made where no serious danger of "raiding" is perceived.

Both the Illinois rule struck down today and the New York rule upheld in *Rosario* restrict voters' freedom to associate with the political party of their choice. In both instances the State has sought to justify the restrictions as promoting the State's legitimate interest in preventing "raiding." While neither rule is perfectly fashioned to accomplish that and no other result, I cannot conclude that the Illinois rule imposes a significantly greater burden on the exercise of associational freedom than does the New York rule we upheld last Term in *Rosario*.